Supreme Court, U.S.
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No. 92-690

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

LAWRENCE J. ANGLIM,
Respondent.

Petition for a Writ of Certiorari to
The Supreme Court of Missouri

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In an action under the Federal Employers Liability Act, 45 U.S.C. §§51 *et seq.*, must there be evidence of some type relating to an appropriate discount rate, an appropriate inflation rate or method of calculating present value in order to submit the issue of the plaintiff's lost future wages to the jury?

2. In an action under the Federal Employers Liability Act, 45 U.S.C. §§ 51 *et seq.*, does the plaintiff have the burden of proving the proper measure of his damages for lost future wages by offering affirmative evidence of the present value of such damages?

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were the Petitioner Missouri Pacific Railroad Company and Respondent Lawrence J. Anglim. Petitioner is a wholly owned subsidiary of Pacific Rail Systems, Inc., which is itself a wholly owned subsidiary of Union Pacific Corporation, a publicly owned company.

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PETITION FOR A WRIT OF CERTIORARI

The petitioner Missouri Pacific Railroad Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Missouri entered in this proceeding on June 30, 1992, and modified on July 21, 1992.

OPINION BELOW

The opinion of the Supreme Court of Missouri is reported at 832 S.W.2d 298. It is reprinted in the Appendix A, p. A-1.

The Circuit Court of the City of St. Louis entered judgment on a jury verdict in the amount of $2,300,000 on September 14, 1989. Pursuant to a motion of the petitioner, the Circuit Court entered an amended judgment in the amount of $2,210,239.82 on

October 12, 1989. The amended judgment is reprinted in the Appendix B, p. A-22.

JURISDICTION

The respondent brought this action in the Circuit Court of the City of St. Louis under the provisions of the Federal Employers Liability Act ("FELA"), 45 U.S.C. §§51 *et seq*.. The Circuit Court entered a judgment on a jury verdict of 9-3 in favor of respondent in the amount of $2,300,000 on September 14, 1989. Pursuant to a motion of petitioner to amend the judgment, the Circuit Court entered an amended judgment in the amount of $2,210,239.82 on October 12, 1989, setting off certain payments to respondent by petitioner pursuant to 45 U.S.C. §55. App. B at A-22.

Petitioner initially appealed to the Missouri Court of Appeals, Eastern District pursuant to Article V, § 3 of the Missouri Constitution. After the Missouri Court of Appeals affirmed the judgment, the Supreme Court of Missouri ordered the case transferred. In accordance with Article V, §10 of the Missouri Constitution and Rule 83.09 of the Missouri Rules of Civil Procedure, the Supreme Court of Missouri decided the case as on an original appeal.

On June 30, 1992, the Supreme Court of Missouri affirmed the judgment of the Circuit Court. Petitioner filed a motion for rehearing. Petitioner's motion was denied on July 21, 1992, and the Supreme Court of Missouri modified the Opinion on its own motion the same day. App. A at A-1 and App. C, p. A-23.

The jurisdiction of this Court to review the judgment of the Supreme Court of Missouri is invoked under 28 U.S.C. §1257(a).

STATUTE INVOLVED

This case arises under the Federal Employer Liability Act ("FELA"), 45 U.S.C. §51, *et. seq*. which provides in pertinent part:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier.

STATEMENT OF THE CASE

In 1984 respondent Lawrence J. Anglim was employed by the Missouri Pacific Railroad Company as a yardmaster in its Omaha, Nebraska yards. Anglim testified that while descending the steps of a locomotive, his foot slipped, he fell backwards and he hit the middle of his lower back on a part of a nearby switch. Missouri Pacific offered evidence that Anglim injured himself the night before when he got drunk and fell down the basement steps at his home.

Anglim sought medical treatment from a St. Louis doctor who performed a procedure on his back known as chemonucleolysis, in which a chemical is injected into the ruptured disk which dissolves a portion of it. The St. Louis doctor released him to go back to work in December 1984. Anglim continued to work at the railroad periodically as his physical condition permitted. Anglim's back worsened and he underwent two more operations in Omaha in 1986 and in 1988. Anglim was unable to work after September 1987.

Anglim incurred medical expenses of $25,267. In addition, he lost $132,000 in wages. At the time he stopped working, Anglim was making $3,690 per month or $44,280 per year. Anglim was thirty-nine years old at the time of trial. Assuming he would work until age sixty-five, he had an additional twenty-six years of expected working life.

At the trial, Plaintiff offered evidence of Anglim's monthly and annual wages. Tr. I-298. In addition, Anglim offered into

evidence a mortality table which established his life expectancy at 41.2 years. Tr. II-510. Neither respondent nor petitioner offered any evidence concerning a projected inflation rate, a discount rate, present value tables, expert economic testimony or any other evidence relating to or from which the jury could have calculated a present value of Anglim's lost future wages.

At petitioner's request, the Court gave an instruction on present value which read:

> If you find in favor of plaintiff and decide to make an award for any loss of earnings in the future, you must take into account the fact that the money awarded by you is being received all at one time instead of over a period of time extending into the future and that plaintiff will have the use of this money in a lump sum. You must, therefore, determine the present value or present worth of the money which you award for such future loss.

Instruction No. 8, L.F. 52.

Anglim objected to the giving of this instruction because "the defendant has not offered any evidence to support the instruction . . . [and] it simply gives the jury a roving commission." Tr. IV-459. The Court overruled the objection and the instruction was given as submitted by the petitioner. Tr. IV-459; L.F. 52. In closing argument there was only one reference to Anglim's lost future wages. Anglim's counsel, during his initial closing argument stated:

> There are some factors we know. For example, we know that Larry has incurred medical expenses in excess of $25,000. We know that his past wage loss to date is in excess of $132,000 and we know that if we projected his wage loss until retirement age 65, his wage loss would be over 1.18 [million] dollars. Those figures we know about.

But ladies and gentlemen, the instructions the court has given you, remember, you figure out the amount of damages he should be given for his pain and suffering, what he's had to date and what he will suffer with the next 41 years and you also have to consider the value of the permanent disability he has suffered and when you return to your jury room we're going to ask you to return figures which you think are fair and which we believe are fair and we will discuss those in a little bit.

* * *

Now, ladies and gentlemen, we've talked about his damages that we know about and I'm simply going to tell you that I don't think asking for another million dollars for a total of 2.3 million is too much in light of what Larry has gone through. To be quite candid with you, when you consider everything that's happened in this case, when you consider the testimony that has come in this case, 10 million wouldn't be too much. But whatever you think is reasonable. But keep in mind that he lives with this for another 40 plus years.

Tr. IV-467-468, 483.

Petitioner's trial counsel made no argument with respect to the amount of the damages. After deliberating for approximately two hours, the jury returned a 9-3 verdict in favor of the Plaintiff awarding him the full $2,300,000 requested by his counsel during closing argument. Subsequently, on motion of petitioner, the Circuit Court amended the judgment to set off payments made by or on behalf of Missouri Pacific directly to Anglim's doctors and to Anglim himself under a disability plan covering Missouri Pacific employees. An amended judgment was entered on October 12, 1989, in favor of Anglim in the sum of $2,210,239.82. App. B at A-22.

Petitioner filed post-trial motions asserting that respondent had failed to make a submissible case for lost future wages because of the lack of evidence of the present value, either by way of expert testimony, present value tables or other evidence of similar import by which the jury could have determined an appropriate discount rate. L.F. 64-67. Petitioner's post-trial motions were overruled. L.F. 159. Initially, petitioner appealed the judgment of the Circuit Court to the Missouri Court of Appeals, Eastern District. After that Court rendered an Opinion affirming the judgment of the Circuit Court, petitioner successfully sought to have the case transferred to the Supreme Court of Missouri. On June 30, 1992, the Supreme Court of Missouri entered its Opinion affirming the verdict and the amended judgment entered by the Circuit Court. Subsequently, on July 21, 1992, the Supreme Court of Missouri on its own motion modified the Opinion and denied petitioner's motion for rehearing. App. C at A-23. With regard to the present value issue, the Supreme Court adopted the opinion of the Court of Appeals with minor changes. App. A at A-10 *n.* 5.

The Supreme Court of Missouri noted that the instruction of the type given by the Circuit Court with respect to present value is mandatory in an FELA case if requested by any party. However, it rejected petitioner's contention that evidence of the manner of computing present value is an essential element of an FELA plaintiff's burden of proof. App. A at A-17. The Court recognized that the federal courts of appeals are divided over this question. App. A at A-17. It held that either party may offer present value evidence, but whether or not such evidence is offered, the subject is open to jury instruction if requested and to jury argument. App. A at A-18. The Supreme Court noted that the jury returned a general verdict and thus there was no specific finding by the jury as to what proportion of the $2,300,000 awarded was attributed to lost future wages. App. A at A-18. In deciding to follow those cases which hold that the plaintiff has

no burden of proving the present value of his lost future wages, the Court said "in the absence of any contrary indication, we can assume each juror in his or her respective fashion complied with the instruction and determined the present value of future wage loss." App. A at A-18.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should issue to resolve a long-standing rift among the federal courts of appeals and among the state courts as to whether a plaintiff in a FELA action must offer some type of evidence of the present value of his lost future wages in order to make a submissible case on that aspect of his or her damages. The Second and Third Circuits have held that a plaintiff must introduce some type of evidence of the present value of his lost future wages in order for the jury to consider the issue. The state courts in Alabama, Montana and Oregon have applied a similar rule. The Fourth, Fifth, Sixth. Seventh, Eighth, and Ninth Circuits as well as the state courts in Kansas, Kentucky, Illinois, Missouri and Texas hold that the plaintiff is under no burden to present such evidence as part of his case.

The courts requiring the plaintiff to present some evidence of present value recognize that, while the concept is readily apparent to the average juror, the determination of the appropriate discount rate and the actual calculation of present value is beyond the ken of most persons in the absence of expert testimony, present value tables or similar evidence. Those courts which do not require the plaintiff to offer present value evidence rely upon the jury's common sense and general experience in financial matters based upon the assumption, as the court below said, that "each juror in his or her respective fashion complied with the [present value] instruction and determined the present value of future wage loss", App. A at A-18, despite the absence of any evidence on that essentially factual issue.

A writ of certiorari should issue to resolve the conflict as to the necessity of present value evidence in order to make a submissible case for the loss of future lost wages under federal law and to decide whether the burden of presenting such evidence falls upon the plaintiff or defendant.

A. The Court Has Not Resolved The Question Of What Constitutes Sufficient Proof Of Present Value And Which Party Bears The Burden Of Proof On That Issue

There are three broad issues which arise in every personal injury case where the plaintiff seeks the recovery of lost future wages: (1) the proper measure of damages; (2) whether and how the jury should be instructed to determine the damages; and (3) what constitutes sufficient evidence to make a submissible case and who has the burden of offering it. These questions, which directly concern the measure of damages in FELA actions, are federal in character. *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 493 (1980). The first two matters were resolved by the court in *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485 (1916). The third is the subject of this Petition.

In *Kelly*, the court reversed a judgment in favor of the plaintiff who had recovered as damages the gross amount of the earnings the employee would have earned to the end of his working life had he lived. The court held that the fundamental underlying principle of the FELA was that the damages should be compensatory only. Therefore, "when future payments or other pecuniary benefits are to be anticipated, the verdict should be made up on the basis of their present value only." 241 U.S. at 491. The jury should be instructed to reduce any award for lost future wages to their present cash value because to do otherwise would be to fail to recognize the self-evident proposition "that a given sum of money in hand is worth more than the like sum of money payable in the future." 241 U.S. at 489.

In the ensuing years the Court has re-affirmed from time to time the principle that the jury must be instructed to reduce any award for lost future wages to present value and that the present cash value of such lost future wages is the proper measure of damages. *See, e.g. Gulf Colorado & Santa Fe R. Co. v. Moser*,

275 U.S. 133 (1927). More recently, in *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409 (1985), the court endorsed *Kelly* "as a definitive statement of the law applicable to FELA cases" establishing beyond question the principle that federal law requires a jury to award the present value of lost future wages after taking into account inflation and other sources of wage increases as well as the rate of interest and that the utter failure to give a present value instruction is reversible error. 470 U.S. at 412.

Although *Kelly* recognized that "it may be a difficult mathematical computation for the ordinary jurymen to calculate interest on deferred payments, with annual rests, and reach a present cash value," it specifically refrained from endorsing any particular rule or formula for the calculation of present value. Rather, the *Kelly* court left to the law of the forum the question of whether the present cash value of the plaintiff's lost future damages would be proved through the admission of testimony of expert witnesses, through the reception into evidence of standard interest and annuity tables in which present values are worked out at various rates of interest and for various periods, or some other method. 241 U.S. at 491.

The court has continued to refrain from endorsing any particular method although it has discussed the general outlines of how present value should be determined. In *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983), the court reversed a judgment under the Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C. §904, because the court applied an irrebuttable presumption that the future rate of inflation will be equal to the future interest rate, thus precluding the application of a discount to the gross amount of wages awarded. The *Pfeifer* opinion reviewed in detail the two steps by which the trier of fact should determine the present value of the plaintiff's lost future wages. 462 U.S. 537-538.

First, the Plaintiff should offer evidence of the gross amount of his lost wages. This is normally done by simply multiplying his annual wages times his expected remaining work life. The most controversial issue which arises at this stage is whether to apply a rate of inflation to the Plaintiff's lost future wages and, if so, what rate to use. In any case where the plaintiff claims lost future wages as damages, including the case below, the plaintiff will always present evidence of the lost stream of income.

The second step, and the one which was missing in the case below, is evidence of a discount rate to be applied to the Plaintiff's lost stream of earnings in order to compute its present value. The *Pfeifer* Court reviewed a number of methods of determining the discount rate, including allowing the litigants to choose between excluding evidence of future price inflation and discounting by the "real" interest rate, or attempting to predict the effects of future price inflation on future wages and discounting by a market interest rate. *Culver v. Slater Boat Co.*, 688 F.2d 280, 308-310 (5th Cir. 1982); *O'Shea v. Riverway Towing Co.*, 677 F.2d 1194, 1200 (7th Cir. 1982). Other alternatives included a total offset method which assumes that the after-tax market interest rate on safe investments is essentially equal to future wage inflation. *See, e.g., Beaulieu v. Elliott*, 434 P.2d 665 (Alaska 1967). Still another method is to assume that the "real interest rate" (*i.e.*, the difference between market interest rates and the rate of inflation) was 2% unless the litigants proved otherwise. *Doca v. Marina Mercanti Nicaraguense, S.A.*, 634 F.2d 30, 39-40 (2d Cir. 1980). The current "real interest rate" is closer to 4%.

Finally, after making the factual findings as to the amount of the plaintiff's lost stream of income over his remaining expected work life and the appropriate discount rate to be used, the trier of fact must perform the mathematical computation of present value. This is itself a laborious process and one which few, if any, laypersons (including judges and lawyers) could accom-

plish without the assistance of a calculator or present value tables.[1]

Pfeifer held that federal law did not compel the use of any single method of calculating the appropriate discount rate. However, it did require the trier of fact to make a "deliberate choice" rather than proceeding upon an arbitrary assumption that may or may not be supported by the evidence. 462 U.S. at 552-553.

The issue of present value last came before the court in *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330 (1988). In *Monessen*, the trial court instructed the jury that a zero discount rate was to be applied as a matter of law to the plaintiff's future damages. The Court once again refused to require any particular method for discounting future damages to present value, holding that this instruction "improperly took from the jury the essentially factual question of the appropriate rate at which to discount [the plaintiff's] FELA award to present value." 486 U.S. at 342.

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[1] The formula for calculating present value is the sum of $1/(1+i)^n$ times the annual wage, where i = the effective annual yield (the discount rate) and n = the number of years. *Pfeifer*, 462 U.S. at 537 *n.* 21. In this case, for example, the plaintiff claimed lost wages of $44,280 per year for 26 years. At a discount rate of 2%, the calculation would be:

$$\$44280 \times 1/(1+.02)^1 +$$

$$\$44280 \times 1/(1+.02)^2 +$$

$$\cdots$$

$$\$44280 \times 1/(1+.02)^{26}$$

It is readily apparent that the calculation of present value involving the computation of a number up to the 26th power is not one most persons, including lay jurors, can perform with a paper and pencil. *See Plourd v. Southern Pacific Transportation Co.*, 513 P.2d 1140, 1145 (Ore. 1973).

B. There Is A Conflict Among The State And Federal Courts As To Whether Any Evidence Of Present Value Or From Which The Jury Could Compute Present Value Is Necessary To Make A Submissible Case For The Jury On The Issue Of Lost Future Wages

To say that any one of several methods of determining the appropriate discount rate and computing the present value of the plaintiff's lost future wages is appropriate does not answer the more fundamental question presented by this case: Whether a jury must be presented with *any* evidence as to an appropriate discount rate, an appropriate inflation rate, the method of calculating present value, or amount of the present value of the plaintiff's lost future wages. Nor have the Court's decisions to date directly ruled upon the question of whether the plaintiff or the defendant bears the burden of proof on this issue. *Western & Atlantic R. Co. v. Hughes*, 279 U.S. 496 (1929) (issue raised but not decided).

The lower courts have sharply divided on the question of whether a plaintiff is required to introduce evidence of an appropriate discount rate, of the method by which present value may be determined or of the present value of the claimed lost future wages. The Third Circuit has been the leading proponent of the rule that the plaintiffs must offer some evidence from which the jury could compute the present value of his lost future wages even when they are given an instruction describing to them the proper measure of damages. In *Ballantine v. Central Railroad of New Jersey*, 460 F.2d 540 (3rd Cir.) *cert. denied*, 409 U.S. 879 (1972), the plaintiff's attorney suggested in closing argument that the jury award the plaintiff his "straight line" future lost wages, *i.e.*, the amount of his annual wages multiplied by the remaining years of his work life without any reduction to present value. 460 F.2d at 542 *n.* 3. Although the jury was instructed to reduce the plaintiff's damages to present value,

there was no evidence offered which would have assisted the jury in making such a computation.

The Court concluded that the calculation of present value — as distinguished from the recognition of the principle — is generally conceded to be beyond the capabilities of most juror. 460 F.2d at 543. At best, it is a tedious and laborious task. *Cf.* C. McCormick *Law of Damages* §86, pp. 304-305 (1935) ("no jury would attempt [computing a present value] unless one of its members were an accountant."). The plaintiff offered no evidence of what interest rate could be expected from a safe investment, no evidence of any expected rate of inflation, and no guidance as to the method of computing the present value of the plaintiff's future wage loss. Accordingly, the Third Circuit granted a new trial because

> once evidence is presented and recovery is sought for future lost earnings, the jury is entitled to receive evidence and appropriate mathematical guidance on the method of reducing lost future earnings to present worth, if they are to act rationally and not upon mere 'conjecture and guess.'
>
> * * *
>
> In determining the amount of compensation the jury should not be left free to roam between confusion and conjecture.

460 F.2d at 540. *See also Gorniak v. National Railroad Passenger Corp.*, 889 F.2d 481 (3d Cir. 1989); *DiSabatino v. National Railroad Passenger Corp.*, 724 F.2d 394 (3d Cir. 1984); *DeChico v. Metro-North Commuter R.*, 758 F.2d 856, 861 (2d Cir. 1985) (court cannot rely upon jury's collective knowledge and experience to take into consideration all relevant factors relating to present value); *Resner v. Northern Pacific Ry.*, 161 Mont. 177, 505 P.2d 86 (1973) (jury may consider effect of inflation only when there is supporting evidentiary basis); *Plourd v. Southern Pacific Transportation Co.*, 513 P.2d 1140 (Ore. 1973) (jury

unable to compute present value without assistance from expert testimony or similar evidence).

More recently, in a case whose facts are substantially identical to those considered by the Court below, the Alabama Supreme Court concluded that federal law required an FELA plaintiff to offer some proof of the present worth of his lost future wages in order to make a submissible case on that issue. *Reusch v. Seaboard System Railroad*, 566 S.2d 489 (Ala. 1990), *cert. denied*, _U.S. _, 111 S. Ct. 581 (1991). In *Reusch*, the plaintiff injured his back when he tripped over some tools at work. He received the same kind of medical treatment, including chemonucleolysis performed by the same doctor who treated Mr. Anglim. The plaintiff offered evidence that he was unable to return to work and sought to recover his lost future wages for the balance of his working life.

At trial, the court instructed the jury that the plaintiff should not be awarded any damages for lost future earnings. As in the case below, the plaintiff offered evidence of his average annual salary and mortality tables, although he offered no specific evidence of his expected remaining work life. The plaintiff offered no evidence of the interest rate on the best and safest investments nor did he attempt to offer any evidence as to an application of any discount rate to his alleged stream of earnings. Moreover, the plaintiff offered no evidence of the effect of inflation on any stream of earnings that he may have had. The court held that federal law required the plaintiff to offer evidence on both steps in the calculation of present value as set forth in *Pfeifer*. Accordingly, the Alabama Supreme Court, in affirming the judgment of the trial court held:

> At most, Reusch produced only a portion of the evidence necessary to ascertain his stream of earnings. Under the applicable federal decisions, we must conclude that he did not produce the evidence necessary to sustain his claim for

> loss of future earnings. The trial court did not err by instructing the jury that it could not award Reusch damages for lost future earnings and loss of earning capacity.

566 S.2d at 492.

The decision by the Supreme Court of Missouri below stands in stark contrast not only to cases such as *Ballantine* and *Reusch*, but also to this Court's decisions in *Kelly, Pfeifer* and *Monessen*. Respondent presented evidence only of his annual earnings and a mortality table showing his life expectancy, relying upon the assumption that he would retire at age 65. There was no evidence of any inflation rate or any discount rate. The Plaintiff did not offer into evidence present value tables from which the jury could calculate the present value of his lost future wages after it had determined the amount of his lost stream of earnings and the appropriate discount rate. In short, there was simply no evidence upon which the jury could have made any calculation of present value.

This lack of evidence, however, failed to trouble the Supreme Court of Missouri. In affirming the award of damages, it held that no evidence of an interest rate, discount rate, inflation rate or, indeed, any method by which the jury could apply such rates as it might find to be applicable, need be offered. The Court recognized that there were conflicting decisions on the issue. App. A at A-17. However, the Court chose to rely upon the express assumption that "each juror in his or her respective fashion . . . determined the present value of future wage loss." App. A at A-18.

The conclusion of the Missouri Supreme Court that the Plaintiff has no burden of offering any evidence on present value other than the gross amount of his lost annual wages and perhaps his remaining life work expectancy follows similar decisions by several federal and state courts. These cases endorse the proposition that "a jury, unaided by specific testimony as to money values, could themselves, being told that the award should be

only money value, properly apply the applicable rule" in reducing the award of lost future wages to present value. *Pennsylvania R. Co. v. McKinley*, 288 F.2d 262, 265 (6th Cir. 1961). *See also Cassino v. Reichhold Chemicals, Inc.*. 817 F.2d 1338 (9th Cir. 1987); *Bonura v. Sealand Service, Inc.*, 505 F.2d 665 (5th Cir. 1975); *Heater v. Chesapeake & Ohio R. Co.*, 497 F.2d 1243 (7th Cir.) *cert. denied*, 419 U.S. 1013 (1974); *Duncan v. St. Louis San Francisco Ry. Co.*, 480 F.2d 79 (8th Cir.) *cert. denied*, 414 U.S. 859 (1973); *Brown v. Chicago & Northwestern Transp. Co.*, 162 Ill.App.3d 926, 516 N.E.2d 320 (1987); *Gannaway v. Missouri-Kansas-Texas R. Co.*, 2 Kan.App.2d 81, 575 P.2d 566 (1978); *Missouri Pacific R. Co. v. Kimbrell*, 334 S.W.2d 283 (Tex. 1960).

All of these decisions were rendered prior to *Monessen* and all but two prior to *Pfeifer*. *Cassino* ignored *Pfeifer* and *Brown* distinguished the holding that the trier of fact make a "deliberate choice" from a requirement that there be any evidence upon which to base that choice. In *Pfeifer* itself, there was no evidence presented by either party as to the proper discount rate. Rather than simply endorse the district court's findings on the issue in reliance upon the assumption that the district judge "in his or her respective fashion . . . determined the present value of future wage loss," as the Missouri court did in this case, this Court reversed and remanded *Pfeifer* for further proceedings. 462 U.S. at 552-553. In following up on this principle, *Monessen* held that the calculation of the present value of damages was "an essentially factual question" to be resolved by the jury. 486 U.S. at 342.

Having said that, it would be illogical in light of *Pfeifer* and *Monessen* to hold that a jury should determine an "essentially factual question" in the absence of any facts. For one to assume, as the Missouri Supreme Court and others do, that lay jurors are capable of making the sophisticated economic analysis or, indeed, even performing the mathematical computation of the

present value of the Plaintiff's lost wages, on any reasoned basis in the absence of any facts and any evidence of discount rates, inflation and the like is to ignore reality. *Plourd*, 513 P.2d at 1145.

Even the dissenting opinion in *Monessen* recognized that there is "no basis for turning a jury loose to speculate about the complex and technical matters that underlie any method of estimating present value." 486 U.S. at 354-355 (O'Connor, J., dissenting). The Missouri Supreme Court's assumption that each juror will "do the right thing" not only invites speculation, it invokes it as a principle of law. In commenting upon decisions which, like the court's below, suggested that the jury needed no "complicated tables" or "complex calculations," McCormick said: "This expression of attitude on the part of the court raises fundamental questions of policy on our haphazard methods of assessing compensation in actions for personal injuries." McCormick, *Law of Damages* § 86, p. 306.

The fear that requiring a plaintiff to offer evidence of the present value of his lost future wages as a prerequisite to submitting the issue to the jury will cause the trial to degenerate into a "graduate seminar" is unfounded. Juries can readily grasp the principle — what they need is information as to how to apply it. Today, juries hear evidence and decide cases involving medical and scientific issues far more complex than the concept of present value.

The Court should grant the writ to resolve the question of whether federal law requires the plaintiff to offer some evidence from which the jury can make an informed determination of the present value of his lost future wages, and thus the Plaintiff's proper measure of damages.

C. There Is A Conflict Among The Federal And State Courts As To Which Party Bears The Burden, If Any, Of Proving The Present Value Of The Plaintiff's Lost Future Wages

The Court has said that "the question of the proper measure of damages is inseparably connected with the right of action." *Kelly*, 241 U.S. at 491. Inextricably tied to the sufficiency of the evidence of a plaintiff's damages is the question of which party bears the burden of proof on the issue. Ordinarily, it would not be subject to dispute that the plaintiff has the burden of proving all of the essential elements of his claim, including the proper measure of his damages.

Our judicial system does not require the defendant to prove a material fact necessary to establish the plaintiff's cause of action. Certainly, there is no requirement that the defendant, for example, prove causation in a negligence action in the event the plaintiff did not. However, the effect of the decision below and those which endorse a similar position, is to require the defendant if it wishes to have evidence of the present value of the plaintiff's future lost wages to submit that evidence itself. This necessarily requires the defendant to prove the plaintiff's measure of damages and thus an essential element of the plaintiff's cause of action.

The allocation of the burden of proof in FELA cases is a federal question. *Central Vermont R. Co. v. White*, 238 U.S. 507, 512 (1915). The courts are divided on this issue in the same manner in which they are divided on the closely related question of whether any evidence at all must be submitted. The Third Circuit, for example, has held that the burden of proof on the question of the present value of the plaintiff's lost future wages rests with the plaintiff. Accordingly, if the plaintiff fails to offer any evidence of the present value of those losses, then he has failed to meet his burden of non-persuasion on the issue. *See*,

e.g., DiSabatino v. National R. Passenger Corp., 724 F.2d 394, 396 (3rd Cir. 1984); *Reusch*, 566 So.2d at 492. Obviously, those courts, such as the Missouri Supreme Court, which hold that no such evidence need be offered at all necessarily reach the opposite conclusion. *See, e.g., Duncan v. St. Louis San Francisco Ry. Co.*, 480 F.2d 79, 87 (8th Cir.) *cert. denied*, 414 U.S. 859 (1973).

Other courts have taken an intermediate position. For example, in *Alma v. Manufacturer's Hanover Trust*, 684 F.2d 622 (9th Cir. 1982) the Ninth Circuit held that the defendant bears the burden of proving the discount rate and the plaintiff bears the burden of proving the inflation rate. 684 F.2d at 626. The Fourth Circuit, in a series of decisions rendered just before and just after the *Monessen* case, appears to have arrived at the same conclusion. *Aldridge v. Baltimore & Ohio R. Co.*, 789 F.2d 1061 (4th Cir. 1986) (*Aldridge I*), *aff'd*, 814 F.2d 157 (4th Cir. 1987) (*en banc*) (*Aldridge II*), *rev'd*, 866 F.2d 111 (4th Cir. 1989) (*Aldridge III*).

In *Aldridge*, there was no evidence presented by the parties of either an inflation rate or a discount rate. The plaintiff told the jury to make a straight-line computation as the measure of his lost future wages, as in the case below, by multiplying the amount of his annual wages times the remaining years of his expected work life. 789 F.2d at 1066. The district court did not give a present value instruction because there was no evidence relating to the present value issue presented at trial. In *Aldridge I*, the Court decided that the allocation of the burden of proof should fall upon the party who would benefit from an acceptance of the facts by the fact finder. 789 F.2d at 1067. The concurring opinion in *Aldridge I* joined in the result only because the judge believed that the defendant had waived the point by failure to preserve it at trial. Nevertheless, the concurring opinion differed with the majority's position that the defendant had the burden of proof on the issue of the present value of the plaintiff's lost future wages. 789 F.2d at 1068.

Upon hearing the case *en banc* in *Aldridge II*, the Fourth Circuit once again affirmed the district court's decision and held that the failure to give a present value instruction was harmless error because there was no evidence offered on the present value issue. A concurring opinion by yet a different judge continued to endorse the principle of cases such as *Alma v. Manufacturer's Hanover Trust*, which like the majority in *Aldridge I*, allocated the burden of proof according to which party would benefit from the evidence. 814 F.2d at 158.

There was, however, a strong dissent in *Aldridge II* on the present value issue. Judge Chapman argued that the burden of proof or non-persuasion should fall upon the plaintiff based upon three fundamental principles: (1) the plaintiff is entitled only to his provable damages and no more; (2) the defendant is not required to produce any evidence and the burden of proving not only injury, negligence and causation, but also damages is on the plaintiff; and (3) the plaintiff's failure to offer sufficient evidence of the measure of his damages, "even in the absence of any rejoinder by the defendant, entitles the defendant to judgment." 814 F.2d at 161.[2]

The Missouri Supreme Court opted for the position that the Plaintiff has no burden of offering any evidence of the present value of his lost future wages.[3] This, in effect, treats the question

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[2] In *Aldridge I*, the Fourth Circuit panel held that it would have been "extremely confusing to the jury to ask it to make these economic adjustments without an evidentiary basis or an explanation by experts as to how such calculations are to be made." 789 F.2d at 1068. Ultimately, however, the case was remanded in *Aldridge III* for a retrial on damages, leaving open the question of whether such evidence is required.

[3] The Missouri court said the issue should simply be left to jury argument. This, if anything, may be worse. Absent the constraint of evidence upon which to base such an argument, counsel is free to tout any figure as the "present value" of the plaintiff's future wage loss even though it bears no discernable relationship to any known inflation rate, interest rate or discount rate.

of present value as if it were an affirmative defense. As a practical matter, such a rule places the defendant in a serious tactical dilemma. By not requiring the plaintiff to prove the measure of the present value of his damages, the defendant must make the Hobson's choice of either unnecessarily underscoring the plaintiff's claim for damages, thereby lending it credibility, or face a damage award which bears a substantial risk of being an inaccurate and inflated assessment of the true measure of the plaintiff's pecuniary damages.[4]

For the foregoing reasons, the Court should issue its writ of certiorari to the Supreme Court of Missouri to resolve the conflict among the lower courts as to whether the plaintiff or the defendant bears the burden of offering evidence of the present value of the plaintiff's lost future wages.

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[4] In the case below, petitioner chose to stand on the respondent's utter failure to offer any evidence of the present value of his lost future wages. The jury awarded respondent the exact amount of damages requested by his counsel in closing argument, including the gross amount of his lost future wages without reduction by any discount rate. There was, of course, no evidence from which the jury could have concluded that the inflation rate would offset the market interest rate. If the jury had applied a 2%-4% "real interest rate," the amount of lost future wages would have been reduced from $1,151,280 to $890,959 or $707,717. The windfall to the respondent (and corresponding loss to the petitioner) was $260,000 to $444,000, from 11%-19% of the total verdict.

CONCLUSION

There is a clear division of authority among the federal and state courts as to whether there must be any evidence presented to the jury on the essentially factual question of the present value of the plaintiff's lost future wages. The Missouri Supreme Court, and several federal circuit courts of appeals and state supreme courts, have held that no such evidence is necessary. These courts' position that the jurors may resolve a factual question in the absence of any facts is truly a startling departure from Anglo-American jurisprudence, not to mention from ordinary principles of federal law.

Moreover, the underlying assumption found in these decisions that the average juror is capable of determining the proper discount rate and making the necessary mathematical computation without the assistance of a calculator with a present value function, present value tables, expert testimony or other similar evidence is simply unfounded. It is one thing to have confidence in the jury system; it is quite another to endorse the speculation and conjecture inherent in the assumption that "each juror in his or her respective fashion" will arrive at the proper measure of damages.

The conflicting decisions of the Third Circuit in *Ballantine* and *DiSabatino* and the Alabama Supreme Court in *Reusch* properly require a plaintiff to offer *facts* from which the jury can find the appropriate discount rate, and a method by which the jury may use that rate, to resolve the "essentially factual question" of the present value of the Plaintiff's lost future wages. This is not merely a theoretical nicety, but a very practical problem involving large sums of money faced by litigants, attorneys and judges in state and federal trial courts throughout the nation every day.

More importantly, the FELA should be administered uniformly on questions concerning federal matters, such as the

proper measure of damages. The conflict among the courts has festered for twenty years. A writ of certiorari should issue to the Supreme Court of Missouri to resolve it once and for all.

Respectfully submitted,

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October 1992

APPENDIX

APPENDIX A

SUPREME COURT OF MISSOURI
EN BANC

No. 74124

LAWRENCE J. ANGLIM,

Respondent,

vs.

MISSOURI PACIFIC RAILROAD CO.,

Appellant.

APPEAL FROM THE CIRCUIT COURT
OF THE CITY OF ST. LOUIS

The Honorable James L. Sanders, Judge

[Filed June 30, 1992;
modified July 21, 1992]

Following a jury trial, a judgment was entered in favor of plaintiff Lawrence J. Anglim and against Missouri Pacific Railroad for injuries sustained in a slip and fall. The claim was brought under the Federal Employers Liability Act, 45 U.S.C. §§ 51-60 (1988) (FELA), and the Boiler Inspection Act, 45 U.S.C. §§ 22-34 (1988). Following opinion by the Missouri Court of Appeals, Eastern District, this Court granted transfer.

I.

The first issue, and the issue moving this Court to grant transfer, is whether the trial court abused discretion in failing to sustain defendant's motion to dismiss plaintiff's claim under the doctrine of *forum non conveniens*. The record before the trial court when the motion was ruled upon is extremely sparse, being limited to pleadings, the motion, suggestions in support of the

motion, and three affidavits. Also before the trial court were plaintiff's suggestions in opposition to the motion to dismiss.

The petition alleges that on April 6, 1984, while plaintiff was employed as a yardmaster at defendant's Omaha, Nebraska, yard, he was injured when he slipped and fell on grease, oil, and water that had accumulated on the steps and walking surfaces of a locomotive. The petition also alleges that defendant's "principal place of business" is in St. Louis, Missouri. Defendants' answer denies any liability and also denies that its principal place of business is in St. Louis. However, it admits being a "common carrier by railroad in interstate commerce in the states of Missouri, Nebraska, and other states in the United States."

One of the affidavits attached to the motion to dismiss for *forum non conveniens* was that of defendant's attorney, William Hamblin. He asserted that "[a]ll of the anticipated witnesses to be called by the parties in this matter, with the exception of Dr. Shoedinger in St. Louis, either work or reside in the Omaha, Nebraska area." The second affidavit was that of Robert G. Galley, manger of the Casualty Management Office for Missouri Pacific. He stated that the defendant railroad is registered to do business and "maintains track, offices and repair facilities" in both Missouri and Nebraska. He stated that defendant is a Delaware corporation and since December 31, 1984, has had its "headquarters" in Omaha, Nebraska. The affidavit also stated that plaintiff and all witnesses except Dr. Shoedinger reside in or around Omaha, Nebraska. Neither of the affidavits indicate precisely where the Missouri offices or facilities are located or exactly what business was done at any of those offices. More particularly, neither affidavit establishes the issue raised in the pleadings, *i.e.*, where defendant's "principal place of business" is located.

Plaintiff's counsel also filed an affidavit alleging that plaintiff was evaluated by numerous physicians and health care providers

in St. Louis, including Dr. Shoedinger who examined plaintiff less than a month after the accident and performed surgery at a St. Louis area hospital. The affidavit further asserted "upon information and belief" that Missouri Pacific does business throughout Missouri, maintaining "offices and agents for the transaction of its usual and customary business in the city of St. Louis." On this record the trial court overruled the motion to dismiss.

The doctrine of *forum non conveniens* provides that notwithstanding proper jurisdiction and venue by the letter of the statute, a trial judge has discretion to not exercise jurisdiction if the forum is seriously inconvenient for the trial of the action involved and if a more appropriate forum is available to the plaintiff. *Restatement (Second) of Conflict of Laws* § 84 (1971). The doctrine is designed to prevent a plaintiff from using a liberal venue statute to vex, oppress or harass a defendant by bringing a suit in a forum unrelated to the parties or cause of action. But a plaintiff's choice of forum is not to be disturbed except for "weighty reasons" and the case should be dismissed only if the "balance is strongly in favor" of the defendant. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 843 (1947); *Silversmith v. Kenosha Auto Transport*, 301 N.W.2d 725, 728 (Ia. 1981).

The first Missouri case to refer to the doctrine of *forum non conveniens* by name was *State ex rel. Southern Ry. Co. v. Mayfield*, 359 Mo. 827, 224 S.W.2d 105 (1949), *cert. granted*, 339 U.S. 98, *vacated*, 340 U.S. 1 (1950), although the doctrine was not applied there. This Court both acknowledged and applied the doctrine in *Elliott v. Johnston*, 292 S.W.2d 589 (Mo. 1956). There the plaintiff's lawyer and a cooperative, if not collusive, defendant arranged for suit to be filed and service of process to be had in Vernon County, Missouri. The claim arose out of an automobile accident that had occurred in an adjoining Kansas county. The parties and all witnesses resided in Kansas. Obviously, the substantive law of Kansas was applicable to the

case. The trial court found, *inter alia*, that the trial could take at least twelve days, would be burdensome on taxpayers, and that "the Missouri dockets and that of Vernon County are already overloaded." The trial court's decision to dismiss on the basis of the *forum non conveniens* doctrine was affirmed. 292 S.W.2d at 594-95.

The doctrine was again acknowledged in *Loftus v. Lee*, 308 S.W.2d 654 (Mo. 1958). But there this Court held that an action filed in Jackson County, Missouri, involving an auto accident that occurred in a Kansas suburb of Kansas City, Missouri, between two Kansas residents was not so unjust and oppressive as to justify application of the doctrine of *forum non conveniens*. The trial court's dismissal on that basis was reversed. 308 S.W.2d at 661.

The applicability of the doctrine to FELA cases was in doubt for a time due to constitutional concerns about denying nonresidents access to Missouri courts. *See State ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1, 71 S.Ct. 1 (1950); *State ex rel. Southern Ry. Co. v. Mayfield*, 362 Mo. 101, 240 S.W.2d 106 (banc 1951); *see also Loftus v. Lee*, 308 S.W.2d at 657. However, this Court subsequently held the doctrine of *forum non conveniens* applicable to a FELA action notwithstanding prior decisions to the contrary. *State ex rel. Chicago, Rock Island & Pacific R.R. Co. v. Riederer*, 454 S.W.2d 36, 38-39 (Mo. banc 1970). This Court's most recent statement of the doctrine in a FELA case is found in *Besse v. Missouri Pacific R.R. Co.*, 721 S.W.2d 740 (Mo. banc 1986), *cert. denied*, 481 U.S. 1016 (1987). Finally, this Court held that the doctrine has no intrastate application. *Willman v. McMillen*, 779 S.W.2d 583, 586 (Mo. banc 1989).

In *Riederer*, at least six factors were identified that trial courts were to use as a guide in exercising their discretion to apply the doctrine of *forum non conveniens*.

(1) place of accrual of the cause of action,

(2) location of witnesses,

(3) the residence of the parties

(4) any nexus with the place of suit,

(5) the public factor of the convenience to and burden upon the court, and

(6) the availability to plaintiff of another court with jurisdiction of the cause of action affording a forum for plaintiff's remedy.

454 S.W.2d at 39. However, neither *Riederer* nor its progeny purport to give an exclusive listing of facts to be considered in deciding whether to apply the doctrine of *forum non conveniens* or the respective weight accorded to any particular factor. Precise rules dictating when the doctrine is applicable might seem attractive. However, evidentiary permutations justifying application of the doctrine are unpredictable. The more prudent course is not "to catalogue the circumstances which will justify or require either grant or denial of remedy." *Gulf Oil Corp. v. Gilbert*, 330 U.S. at 508, 67 S.Ct. at 843. In deciding whether to dismiss, a trial court necessarily must determine facts and, in doing so, weighs evidence and assesses the credibility of witnesses as to the reasons given for selecting or opposing a particular forum. Witness intangibles and knowledge common in the community where the case is tried impact on the weight and credibility of evidence.[1] Because the application of the doctrine of *forum non conveniens* is fact intensive and the weight to be accorded any factor is dependent on the circumstances, trial court discretion is essential. Nevertheless, discretion is not the

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[1] The court of appeals opinion takes note of a "multistoried Missouri Pacific Railroad Building with offices for hundreds of defendant's employees within sight of the Circuit Court of the City of St. Louis."

equivalent of whim; discretion must be applied with control. *Besse*, 721 S.W.2d at 742.

On appeal, in determining whether the trial court's ruling amounted to an abuse of discretion, only those facts will be considered that were before the trial court when it ruled on the motion to dismiss,[2] and the evidence will be viewed in a light favorable to the result of the trial court. Also on appeal, discretionary rulings are presumed correct, and the appellant bears the burden of showing an abuse of discretion. *State ex rel. Webster v. Lehndorff Geneva*, 744 S.W.2d 801, 804 (Mo. banc 1988). Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable persons can differ about the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *Id.* In the context of an appeal from an order overruling a motion to dismiss based on a claim of inconvenient forum, the decision of the trial court is not to be disturbed unless the appellate court is firmly convinced of two propositions. First, the appellate court must be convinced that the relevant factors weigh heavily in favor of applying the doctrine of *forum non conveniens*. Second, the court must be convinced that permitting the case to be tried in Missouri would lead to an injustice because such trial would be oppressive to the defendant or impose an undue burden on Missouri courts.

The factors identified first in *Riederer*, and later in *Besse*, favorable to dismissal of this case include the residence of

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[2] Certain language in *Besse* suggests that evidence offered during trial should be considered on appeal in determining if the trial court abused discretion in overruling a pre-trial motion based on *forum non conveniens*. *See Besse*, 721 S.W.2d at 743. That dicta is not supported by reason or case law and is not to be followed.

plaintiff in Nebraska, that the action accrued in Nebraska, and that most witnesses reside in Nebraska. In addition, defendant agreed to waive the statute of limitations for the period after the suit was filed in the City of St. Louis, thus giving plaintiff a forum in which to pursue his remedy.

In assessing the "location of witnesses" factor, defendant notes that seven identified witnesses were from Nebraska, while only Dr. Shoedinger was in Missouri. In *Besse*, eyewitnesses and treating physicians seem to have been placed on an equal footing in making the *forum non conveniens* analysis. 721 S.W.2d at 742. However, it is not unusual for the most critical fact issue in a personal injury suit to be the nature and extent of the plaintiff's injury, while the facts surrounding the accident that resulted in the injury may be virtually uncontested. In such cases, the need to have ready access to the treating physicians and medical records is as critical to the preparation and trial of the case as is accessibility to eyewitnesses to the accident. In addition, the cost of presenting an expert treating physician at some location distant from his or her practice may exceed the cost of transporting several eyewitnesses to Missouri. On this, as on other factual matters, the moving party has the initial burden of establishing the relative inconvenience caused by the witnesses' location and, on appeal, the aggrieved party must also show that discretion was abused. The mere fact that more witnesses are located in another state than are located in Missouri does not conclusively establish the question of witness location favorably to the defendant.

On the issues of defendant's residence and nexus to Missouri, the evidence is ambiguous, if not favorable, to plaintiff. Missouri Pacific suggests that it is not a "resident" of Missouri because its corporate headquarters is in Omaha, Nebraska. The argument is founded on a statement in *Besse* that the location of defendant's headquarters in Missouri was a "controlling circumstance" in refusing to dismiss plaintiff's case. 721 S.W.2d at 743. The

argument assumes that a corporate headquarters is necessarily the "principal place of business" of a corporation. The assumption is flawed. A corporation may be created under the laws of one state, have its headquarters in another state, and do its primary business in yet one or more other states. Nothing in the affidavits establishes the principal location of defendant's business or the primary location of defendant's Missouri operations. The record establishes that defendant has offices, employees, a registered agent, tracks, and maintenance facilities in the City of St. Louis and that it engages in all aspects of the business of a common carrier railroad in Missouri. Defendant's brief candidly admits it is a resident of St. Louis under Missouri's corporate venue statute. § *508.040*, RSMo 1986. Implicitly defendant solicits business and undertakes transportation of goods to and from Missouri shippers. Implicit also is that defendant's business is conducted by or through its facilities in the City of St. Louis, Missouri.

Other than the designation of Omaha as its headquarters, defendant has failed to show that it has so significantly limited its Missouri operations that it may not be considered as a Missouri "resident" in the context of the *Riederer* factors.[3] As stated in *Besse*, it is seldom considered inconvenient to be sued in a defendant's place of residence. 721 S.W.2d at 743. To prevail on a claim that the trial court abused discretion finding the defendant has a Missouri residence or nexus, the defendant must produce substantial evidence clearly demonstrating that the corporate business activities in Missouri are limited or that

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[3] While not precisely on point, various cases construing Missouri's venue statutes have found a corporation to be a resident of the county in which a registered agent is located or where the corporation maintained an office or agent for the transaction of its business. *State ex rel. Rothermich v. Galagher*, 816 S.W.2d 194, 198-200 (Mo. banc 1991); *State ex rel. Dick Procter Imports, Inc., v. Gaertner*, 671 S.W.2d 273, 274-75 (Mo. banc 1984) (construing § 508.010, *et seq.*, RSMo 1986).

those activities have no significant relationship to the jurisdiction in which the case is filed.

The other factor to be considered is the convenience to and burden on the court. Statistical data may be submitted to support a claim that the caseload of the trial court is so overwhelming that the case cannot be expeditiously litigated in the jurisdiction where the case is filed. Such matters as taxpayer cost, jury time, the necessity to interpret and apply the law of a foreign jurisdiction, and similar facts may be offered and weighed by the trial court. In addition, the trial court may take notice of the congestion of its own docket. In this case, the trial judge is experienced and has served as the presiding judge of his circuit. He was undoubtedly aware of the state of the docket in St. Louis when the motion was heard. The substantive law in question is federal law. The courts of this state are familiar with both the interpretation and application of the Federal Employers Liability Act. No specific evidence of any undue burden on the court was offered at the motion hearing.[4]

Under the facts of this case, the trial court may well have sustained the motion to dismiss without abusing discretion. But to reverse the trial court's ruling on appeal requires more than a showing that the motion could have been sustained. Defendant has failed to convince this Court that the factors strongly favor dismissal and that this case imposes an oppressive inconvenience on the defendant or undue burden on the circuit court of the City of St. Louis. In sum, after reviewing the record and considering all relevant factors, it cannot be said that the trial court's ruling is clearly against the logic of the circumstances and so arbitrary and unreasonable as to shock the sense of justice

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[4] The briefs of defendant and an *amicus* brief filed in this Court by other railroads contain alleged statistics and data regarding FELA claims in the City of St. Louis. The data were not before the trial court when it ruled on the motion to dismiss and will not be considered at this late date.

and indicate a lack of careful consideration. Thus, no abuse of discretion has occurred. The first point is denied.

In reaching this conclusion, this Court reiterates that the doctrine of *forum non conveniens* is available in appropriate cases and is neither abandoned nor modified. We reject the suggestion that the rule be modified so that whenever litigation is between out-of-state residents over causes of actions that arose out of state, a plaintiff must bear the burden of justifying the choice of forum. The federal statute authorizes venue in any jurisdiction "in which the defendant shall be doing business." 45 U.S.C. § 56 (1988). Because of the policy declared by that statute, the United States Supreme Court has said, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp. v. Gilbert,* 330 U.S. at 508, 67 S.Ct. at 843. The Supremacy Clause of article VI of the United States Constitution constrains us to apply the policy expressed by the federal venue law with no less enthusiasm than if it were our own. *Bunge Corp. v. Perryville Feed & Produce*, 685 S.W.2d 837, 839 (Mo. banc 1985). Also, our state's General Assembly has adopted an extremely liberal venue policy in regard to railroad corporations. A railroad controlling, owning, or operating facilities in two or more counties may be sued in any such county or in any county where it keeps an office or agent for the transaction of its business. § *508.040*, RSMo 1986. For these reasons, the defendant has the burden of establishing all factors supporting a claim that a Missouri court is an inconvenient forum.

II.[5]

Defendant's next point on appeal alleges trial court error in overruling its motion for a new trial based upon the failure of one

[5] The remainder of this opinion, with some minor changes, is that of the Missouri Court of Appeals, Eastern District, authored by the Honorable Carl R. Gaertner, Chief Judge.

juror to disclose her involvement in a lawsuit upon voir dire examination.

The following question was addressed to the entire venire by plaintiff's attorney:

> We talked earlier about Workmens [sic] Compensation claims. And what I'd like to do now is broaden that question a little bit. Is there anybody who's ever filed any sort of claim for personal injury other than Workmens [sic] Compensation? So if you've been in automobile accident and you were injured and you filed a claim, even if you didn't file a lawsuit, but you made the claim or you maybe slipped and fell somewhere and you filed a claim against somebody asking for compensation.
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> . . . .
>
> . . . Any type of claim. And to simplify matters and save some time, not only the members on the panel, but also members of their family, so either you, your husband, wives, children, nephews, cousins, the whole shebang.

Juror #1, Mrs. Margaret Unger, had previously answered more specific questions concerning back injuries and workers' compensation claims by members of her family. She disclosed the fact that her husband had sustained a "slipped disk" in his back twenty years ago, and that he had also made a workers' compensation claim for a knee injury. In response to the question set forth above, she informed counsel that her son had a pending claim arising out of an automobile accident. She did not mention the fact that there was then pending in United States District Court for the Eastern District of Missouri a lawsuit in which she was named as a plaintiff. She was chosen to serve on the jury and signed the verdict.

A hearing was held pertaining to this allegation in defendant's motion for new trial. It was there developed that Mrs. Unger's

husband was an asbestos worker. In 1986, a lawsuit was filed against a number of asbestos manufacturers alleging Mr. Unger had contracted asbestosis. Mrs. Unger was named as a plaintiff in a consortium count. At the hearing she testified that although she had accompanied her husband when his deposition was taken and had at that time been questioned briefly about his health, she had not been aware of the fact she was named as a plaintiff in the lawsuit. It was her understanding that the lawsuit had been filed on behalf of her husband, who had never received any medical treatment or missed any time from work because of asbestosis, in order to protect his rights if, in the future, he began to suffer from years of exposure to asbestos. In fact, after the verdict in this case but before the hearing on the motion, the federal case was dismissed upon the agreement of the defendants therein to waive any statute of limitations defense. Mrs. Unger testified that at the time she was questioned about family claims and injuries the Federal Court lawsuit never entered her mind; she "never thought of it" until defendant's attorney called her.

In its order overruling defendant's motion for new trial, the court made the following finding:

> The Court held a hearing on Defendant's portion of its motion dealing with the issue of non-disclosure by a juror. The Court heard the juror's testimony and is convinced that she is a very truthful witness. During voir dire she disclosed three events involving personal injury claims in her family. The nondisclosure complained of here involves an asbestos class action suit wherein her husband was a named Plaintiff as well as herself. She did not know she had been named as a Plaintiff. Her husband was named as a Plaintiff because he was an asbestos worker. He did not have asbestosis and was not being treated for it. The action was filed to toll the statute of limitations. The case was then dismissed with the provision that if any of those named Plaintiffs contracted asbestosis then the statute of limitations would not be raised

> as a defense in a subsequent filing. The Court is of the opinion that this was an innocent non-disclosure and there was no prejudice to the Defendant.

The trial court's conclusion that this was an "innocent non-disclosure" indicates that the trial judge believed the juror's conduct was unintentional. In addition, because Mrs. Unger had at present sustained no injury for which she anticipated recovery, her failure to respond to a question regarding any "claim" was reasonable. Where a nondisclosure is both unintentional and reasonable, the relevant inquiry is whether the juror's presence did or may have influenced the verdict so as to prejudice the party seeking a new trial. *Williams by Wilford v. Barnes Hosp.*, 736 S.W.2d 33, 37 (Mo. banc 1987).

A trial court's acceptance or rejection of the juror's explanation is not lightly overturned on appeal. The trial court's finding of a lack of prejudice is a fact finding and, as such, will be disturbed on appeal only for abuse of discretion. 736 S.W.2d at 37. Only when an appellate court is convinced from a totality of the circumstances that the right to fair trial and the integrity of the jury process has been impaired should the trial court be found to have abused discretion. *Alexander v. F. W. Woolworth Co.*, 788 S.W.2d 763, 768 (Mo. App. 1990).

We have no such conviction here. The trial court specifically found Mrs. Unger to be a truthful witness. Because of the greater ability of the trial judge to observe the juror's demeanor both during voir dire and during a post-trial explanation of her nondisclosure, we afford his determination of credibility great deference. The record lends support to the trial court's finding as Mrs. Unger's openness and candor is demonstrated by the fact that she responded to questions propounded to the entire venire more than any other prospective juror. We can perceive no reason, nor does defendant suggest any reasons, to explain why she should unhesitatingly disclose the prior claims of her hus-

band and son and conceal the asbestosis lawsuit other than what she said: "I never thought about it." The unusual nature of the Federal Court action, filed to protect against future developments before any medical treatment or loss of work had taken place, renders this forgetfulness understandable. Mrs. Unger was a former employee of a railroad as had been her father-in-law, facts disclosed on voir dire, and bore no animosity toward this defendant or any railroad. The record amply supports the trial court's finding of an innocent non-disclosure causing no prejudice to defendant.

III.

Over plaintiff's objection defendant presented the testimony of Professor Gary Herrin, an expert in ergonomics, the study of work. The gist of Professor Herrin's testimony is stated in defendant's brief as follows:

> The import of his testimony was that the locomotive's steps would not have been significantly more slippery with oil on them than if they were dry and [plaintiff] should not have slipped on the steps even if they were oily . . . [and] if [plaintiff] had slipped on the steps in the manner he described he would have fallen *towards* the locomotive instead of *away* from it.

In advance of the testimony, plaintiff's counsel objected that the proposed evidence was not a proper subject of expert testimony because it concerned a matter of common knowledge and because of the lack of foundation in that the tests the professor conducted did not reproduce similar circumstances to those existing at the time of plaintiff's fall. Although expressing some reservation, the trial court overruled the objection and permitted the testimony.

The witness testified concerning tests he made to determine the coefficient of friction between an oily locomotive step and

work shoes. He did not know the type work shoes worn by plaintiff, but used what he was told by a shoe repair man were common types of soles on work boots, the only two types the repair man had in stock. He did not know the exact nature of the substance on the steps when plaintiff fell but used medium weight shop lubricating oil in his test. However, based upon assumptions drawn from plaintiff's deposition, he developed a computerized simulation of a three-dimensional bio-mechanical model and simulated twenty-four different postures, that is, varying angles of a foot upon the steps and positions of hands upon the railings, and concluded that:

> So there's force that's acting on foot and force that's acting on each of the hands. And so in no case did we observe hand forces that exceeded peoples grip. Doesn't have the capability based on population studies. And with one exception — two exceptions maybe we could, wouldn't simulate a slipping type of conditions with the stair and the foot.

Based upon the same assumptions and tests, the witness also concluded that plaintiff would have fallen forward rather than backward as he claimed. At the conclusion of all the evidence plaintiff offered the following withdrawal instruction:

> The evidence of Professor Gary Herrin is withdrawn from the case and you are not to consider such evidence in arriving at your verdict.

Because the expert testimony was based upon the assumption of facts not in evidence and upon tests that did not duplicate the conditions existing at the time, particularly the nature and extent of the oil and grease and the type and condition of the soles of plaintiff's boots, the trial court gave the withdrawal instruction. We find no error.

Exclusion of testimony and giving withdrawal instructions are both matters within the discretion of the trial court. *Kelly v.*

Jackson, 798 S.W.2d 699, 704 (Mo. banc 1990); *Dunn v. St. Louis-San Francisco Ry. Co., 621 S.W.*2d 245, 252 (Mo. banc 1981). Experimental evidence is admissible only if the experiment is made under substantially similar conditions to those at the time of the accident, although the conditions need not be identical. *Blevins v. Cushman Motors,* 551 S.W.2d 602, 610 (Mo. banc 1977). That no such substantial similarity was shown between the material facts pertaining to plaintiff's slip and fall and the computer test on which Professor Herrin based his opinion is obvious. The trial court did not err in giving the withdrawal instruction.

IV.

Plaintiff introduced evidence concerning the loss of future wages as a result of his injury. No evidence was introduced regarding the present value of the total of wages to be earned in the future. At defendant's request the court gave the following instruction:

> If you find in favor of plaintiff and decide to make an award for any loss of earnings in the future, you must take into account the fact that the money awarded by you is being received all at one time instead of over a period of time extending into the future and that plaintiff will have the use of this money in a lump-sum. You must, therefore, determine the present value or present worth of the money which you award for such future loss.

Such an instruction is mandatory in a FELA case if requested by any party. *St. Louis Southwestern Ry. Co. v. Dickerson,* 470 U.S. 409, 411-12, 105 S.Ct. 1347, 1349 (1985). Defendant now argues the court erred in permitting plaintiff to recover as a part of his damages any amount for the loss of future wages because the jury was not given any advice regarding the manner of computing the present value of future losses. First of all, defendant implies it was error to give the present value instruction

because it had no evidentiary support. However, the instruction was given by the court at the request of the defendant. A party may not be heard to complain on appeal about an instruction offered by the complaining party. *Bonnot v. City of Jefferson City*, 791 S.W.2d 766, 771 (Mo. App. 1990).

Of more substance is defendant's argument that, since a present value instruction is required in FELA cases, evidence of the manner of computing present value is an essential element of an FELA plaintiff's burden of proof. Defendant relies upon two decisions of the United States Court of Appeals, 3rd Circuit, which so hold . *DiSabatino v. National Railroad Passenger Corp.*, 724 F.2d 394, 396 (3rd Cir. 1984); *Ballantine v. Central Railroad of New Jersey*, 460 F.2d 540, 544 (3rd Cir.), *cert. denied*, 409 U.S. 879 (1972) . Defendant acknowledges the 8th Circuit has reached a contrary conclusion. *Duncan v. St. Louis-San Francisco R.R. Co.*, 480 F.2d 79, 87 (8th Cir.), *cert. denied*, 414 U.S. 859 (1972) .

While no Missouri case has specifically addressed the point, Missouri appears to follow the rule laid down by the 8th Circuit. In *Bair v. St. Louis-San Francisco Ry. Co.*, 647 S .W. 2d 507 (Mo. banc), *cert. denied*, 464 U.S. 830 (1983), this Court stated, "The fact that a dollar today is not the same thing as a dollar payable some years from now, furthermore, is the matter of plainest fact which could be appropriately argued without the need for expert testimony." 647 S.W. 2d at 513. *See also Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371, 387 (Mo. banc 1986).

Defendant discounts the authoritative nature of *Bair*, arguing that it has been rendered obsolete by reason of the *Dickerson* mandate to instruct on present value. While *Dickerson* required the instruction noted above, it also stated, "[N]o single method for determining present value is mandated by federal law." 470 U.S. at 412, 105 S.Ct. at 1349. Therefore, we do not run afoul of the federal law by following *Bair* and holding that either plaintiff

or defendant may offer present value evidence, but whether or not such evidence is offered, the subject is open to jury instruction if requested and to jury argument. We reject defendant's argument that the verdict of the jury reflects a "total failure to reduce the future damages to future value." The jury returned a general verdict, as is required under Missouri procedure. *Rule 71.02*. The sum included within the general verdict as compensation for future loss of wages is a matter forever relegated to the bosom of the jury. In the absence of any contrary indication, we can assume each juror in his or her respective fashion complied with the instruction and determined the present value of future wage loss.

V.

Plaintiff's cross-appeal challenges the trial court's order amending the judgment by granting defendant a set-off in the sum of $8,134.61 in recognition of money paid by Union Pacific Railroad (UPR) for medical treatment and $81,625.57 representing payments made to plaintiff by Union Pacific Corporation (UPC) pursuant to a salary continuation and long-term disability plan. The court further ordered that defendant be given credit for any disability payments made between the time of judgment and the date the judgment is satisfied.

Plaintiff argues that defendant Missouri Pacific Railroad (MPR) is not entitled to a set-off under the provisions of 45 U.S.C. § 55 (1988) because it did not make the payments, because the payments were not made in order to reduce its liability under the FELA, and because the plans pursuant to which the disability payments were made do not provide for recoupment of sums paid prior to judgment in the FELA action.

45 U.S.C. § 55 (1988) provides, in pertinent part, as follows:

> [I]n any action brought against any such common carrier under or by virtue of any of the provisions of this chapter,

> such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

Plaintiff concedes that if the payments at issue were made by MPR the statute would apply and MPR would be entitled to the set-off. However, because the payments were made by UPR and UPC, plaintiff argues the statute has no application and the collateral source rule prohibits the giving of credit to the defendant for payments made by others.

At the heart of this dispute is the corporate structure in which the three corporations exist. As we understand the situation, UPC is a holding company which, through various wholly owned subsidiary corporations, is the ultimate owner of 100 percent of the stock of UPR and MPR. Although there has been considerable merging and consolidation of the operations of the various corporations, they have each maintained a distinct corporate status and identity. Plaintiff relies upon *Boswell v. May Centers, Inc.*, 669 S.W.2d 585 (Mo. App. 1984), in which a subsidiary corporation sought immunity from its negligent infliction of injury upon an employee of its parent corporation under the exclusive remedy provisions of the workers' compensation law § 287.120.1, RSMo 1986. In denying the subsidiary corporation such immunity, the court stated:

> It is totally incongruous and patently unjust to permit the parent to hide behind the shield of separate corporate identity when advantageous, but to disallow such separateness when it is not. Strangers may be permitted to show commonality of control and identity, but the corporation may not "pierce its own corporate veil" — a veil it has deliberately established.

Boswell, 669 S.W.2d at 586.

Although we find no fault in the principles enunciated there, *Boswell* is not dispositive of the issue here presented. In *Boswell*, the subsidiary corporation did not fit within the statutory definition of an "employer", § 287.030.1(1), RSMo 1986, and therefore did not have standing to assert the exclusive remedy defense. That the payments in this case were made by related but nevertheless distinct corporations is not a crucial issue in determining the applicability of 45 U.S.C. § 55. In distinguishing between payments under the statute and collateral source payments, the federal courts have said "[t]he important consideration is the character of the benefits received, rather than whether the source is actually independent of the employer." *Clark v. Burlington Northern, Inc.*, 726 F.2d 448, 450 (8th Cir. 1984). Thus, in *Folkestad v. Burlington Northern, Inc.*, 813 F. 2d 1377 (9th Cir. 1987), payments made through an insurance company under a plan financed by various railroads were held subject to the statutory setoffs. In both *Clark* and *Folkestad* particular note was paid to the fact that, although the plans provided for payment on account of both work related and non-work related injuries, the plans also provided for reduction of the employee's recovery under FELA to the extent of payments received. Permitting this setoff "was appropriate because of the intent of the Congress to permit the employer to avoid double liability. " *Folkestad*, 813 F.2d at 1383. As noted in *Clark*, 726 F.2d at 451, "the employer's manifest intent to avoid double liability in offering disability plans must be respected if the collateral source rule is not to swallow up 45 U.S.C. § 55 at the ultimate expense of employees."

The plans under which the payments were made in this case provide they are made on behalf of "affiliate" companies, which include MPR. The plans also provide that payments made shall be reduced by any amounts payable by any workers' compensation, *employer's liability* or similar law. We think it obvious the purpose of the plans, covering employees of all the related railroads was to avoid double liability. This purpose, in accord with congressional intent, is the crucial issue. It is to the benefit

of the injured employee that he receive payment for medical care and disability income without the inevitable delay attendant to the conclusion of litigation in which these medical expenses and lost wages are a part of his recovery. The railroad should not be punished nor should the employee receive a windfall for which he has contributed nothing, by allowing the employee a double recovery.

We also note that, although the payments under the plans were not made by checks drawn against any MPR account, the payroll of MPR and other subsidiary railroads are also paid by UPR. Charges against the various companies, including charges for the cost of the plans, is a matter of internal bookkeeping procedures within the overall corporate structure.

Accordingly, plaintiff's appeal is denied.

The judgment of the trial court in all respects is affirmed.

JOHN C. HOLSTEIN, Judge

Robertson, C.J., Covington, Benton, Price, JJ.,
Crow and Conley, Sp.JJ., concur.
Thomas, J., not participating.

APPENDIX B

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
STATE OF MISSOURI

Cause No. 872-01007
Division No. 7

LAWRENCE J. ANGLIM,
Plaintiff,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
Defendant.

[Filed October 12, 1989]

AMENDED JUDGMENT

Defendant's Motion To Amend the Judgment previously argued and taken as submitted is sustained and the judgment is amended as follows:

> The previous judgment if $2,300,000.00 is hereby reduced in the amount of $89,760.18 and an amended judgment of $2,210,239.82 is hereby entered as the judgment in this case.

It is further ordered that the Defendant be given credit against the judgment for any future payment to the Plaintiff under either the Salary Continuation Plan or the Long Term Disability Plan from the date of the judgment until the judgment is satisfied.

SO ORDERED:

/s/ James L. Sanders
James L. Sanders, Judge

cc: Mr. William D. Hamblin
Mr. Dan H. Ball
Mr. Paul C. Hetterman

APPENDIX C

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
POST OFFICE BOX 150
JEFFERSON CITY, MISSOURI 65102
TELEPHONE
(314) 751-4144
THOMAS F. SIMON
CLERK

July 21, 1992

Mr. Dan H. Ball
Mr. James W. Erwin
Suite 3400
One Mercantile Center
St. Louis, Missouri 63101

In re: Lawrence J. Anglim vs. Missouri Pacific Railroad Company
Supreme Court No. 74124

Dear Counsel:

Please be advised that the Court this day entered the following order in the above-entitled cause:

"Appellant's motion for rehearing overruled. Opinion modified on Court's own motion."
Thomas, J., not participating.

Very truly yours,

THOMAS F. SIMON

/s/ Mary Elizabeth McHaney
Mary Elizabeth McHaney
Deputy Clerk, Court en Banc

/csm

cc: Mr. Robert Ritter & Mr. Joe Walsh III
Mr. Paul Hetterman
Mr. John Bardgett
Mr. Steven Ringkamp
Mr. Albert Schoenbeck
Mr. John Crenshaw
Mr. Michael Quinlan
Mr. Michael Costello
Mr. Martin Zucker

Supreme Court, U.S.
FILED
NOV 19 1992
OFFICE OF THE CLERK

No. 92-690

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

VS.

LAWRENCE J. ANGLIM,
Respondent.

Petition for a Writ of Certiorari to
The Supreme Court of Missouri

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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No. 92-690

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MISSOURI PACIFIC RAILROAD COMPANY,

Petitioner,

VS.

LAWRENCE J. ANGLIM,

Respondent.

Petition for a Writ of Certiorari to
The Supreme Court of Missouri

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

A writ of certiorari may not be granted in this case because there is no error of the trial court that has been preserved for review, and the Missouri Supreme Court's decision in this case is not contrary to any decision of this Court. Petitioner seeks to invoke the Court's jurisdiction by alleging a conflict among the federal circuits as to whether testimony on present value concepts must be adduced in the plaintiff's case in chief, in cases brought under the Federal Employer's Liability Act, 45 U.S.C., Sec. 51 et seq. ("FELA"). As will be discussed herein, this

conflict is a manufactured one, and in no way supports granting a writ of certiorari. Only two Third Circuit cases even suggest that this may be required, and in neither case was the jury given a present value instruction proposed by the defendant as in the case at bar. Further, in each case the defendant made its objection to future damages to the trial court.

In the case now before the Court, the jury not only was instructed on present value, but was given an instruction proffered by Petitioner. This instruction recognized the jury's discretion to award future wage loss. Petitioner asked the trial court for nothing more than the instruction that was given. Petitioner did not make a specific motion for directed verdict or seek a withdrawal instruction on damages. After verdict, however, Petitioner raised, for the first time, an argument that Respondent failed to make a submissible case for future wage loss because he did not introduce expert testimony regarding annuity tables, discount rates, inflationary trends, and the like.

Petitioner has not cited a case, and research has not uncovered one, in which a trial judge instructed the jury properly on present value, and the verdict was later overturned on appeal for a plaintiff's failure to introduce evidence of present value. Further, it is required in the federal courts and in Missouri that a defendant, perceiving error in the trial court, must call it to the trial court's attention in order to preserve the point for appeal. This Petitioner failed to do.

The Court has cautioned against the undue prolonging of injury trials by complicated, detailed testimony on the inexact science of present value. The Court has also expressed its confidence in juries' understanding of the earning power of money and the history of inflation and interest rates over the years. The Court has never declared that all FELA plaintiffs must introduce expert economic testimony to support his or her claim for damages. Likewise, defendants in FELA cases are free to

offer evidence on present vale, and to require a proper present value instruction. There is simply no basis for the relief Petitioner now seeks.

The case before the Court is not a proper one in which to decide whether present value data is mandatory in all injury trials. The Court has never excused the party requesting certiorari from presenting its position to the trial court in the first instance. The days of "trial by ambush" are gone from the federal and state courts. For the Court to grant certiorari on the record in this case would be to condone "appeal by ambush." A defendant, knowing full well that no present value evidence was adduced, could submit a present value instruction in hopes of keeping the verdict down, and then save its submissibility argument for the court of appeals.

No issue is raised by Petitioner that justifies the Court's writ of certiorari.

ARGUMENT

A. There Is No Conflict Among The Circuits On The Issue Of Present Value That Justifies This Court's Writ Of Certiorari; No Case Has Held That, When A Jury Is Properly Instructed On The Issue, The Verdict Can Be Overturned For Failure To Make A Submissible Case On Future Damages, And No Case Has Held That A Defendant Who Proffers A Present Value Instruction May Later Claim No Evidence Supported The Instruction

Petitioner admits that at trial it did not put on evidence of present value, move for a directed verdict as to future damages, or even argue damages in its closing argument to the jury. It is easily inferred from the petition for writ of certiorari that there was no serious challenge to Respondent's proof of future wage loss. As Petitioner states: "Anglim was unable to work after September 1987." Petition, at 3. Recognizing the likelihood that future damages would be awarded, Petitioner tendered the present value instruction set out in its petition, at 4. The trial court gave this instruction without modification. Petitioner requested no more specific instruction than the one given. Respondent's counsel discussed future wage loss and future pain and suffering during closing argument, without objection by Petitioner's counsel. After trial, Petitioner argued for the first time that Respondent's failure to introduce present value evidence was fatal to his claim for future damages.

It is against this background that the issues raised by Petitioner must be reviewed. As will readily appear, Petitioner's argument truly is unique, in that no railroad defendant has ever argued successfully that the plaintiff failed to make a submissible case on future damages, after failing to raise the claim before the trial court, and after requesting and receiving a present value instruction.

There is no question that the proper measure of future damages in a case brought under the FELA is the present value of the future loss. *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485 (1916). It is also clear that the failure to instruct on present value, after a proper request to do so, is error. *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409 (1985). Moreover, the Court has declared that reducing future loss to present value is a function relegated to the jury, and the trial court must not preempt the jury's function. *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330 (1988). The Court has carefully refrained from establishing rigid present value calculations for use in all federal trials. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 546 (1983).

What the Court has never declared, and what Petitioner seeks, is a requirement that in any FELA case, a plaintiff seeking future lost wages, pain and suffering damages, or both, must provide the jury with statistics, charts, mathematical tables and economic forecasts on the issue of present value. Respondent submits this request by Petitioner is unwarranted and unwise, and would go a long way toward converting an injury trial into a "graduate seminar on economic forecasting." *Pfeifer*, 462 U.S. at 548.

Courts have held uniformly that as long as the jury is properly instructed by the trial judge, no specific type of present value evidence is mandated. The genesis of this rule is in *Louisville & N. R. Co. v. Holloway*, 246 U.S. 525, 38 S.Ct. 379 (1918). In *Holloway*, an FELA wrongful death action, the defendant railroad offered evidence of annuity tables utilizing six and seven percent as the discount rate. The trial court refused defendant's proposed instruction that would have required the jury to use the prevailing interest rate in Kentucky, six percent. Rather, the court stated that the jury's verdict should fairly and reasonably "compensate" the widow. 38 S.Ct. at 380.

The Court noted that the defendant had the right to require a specific present value instruction, but failed to exercise that right in the trial court. Further, the Court held that the jury was not misled by the instruction requiring it to "compensate" the widow for the loss of benefits she would have received but for her husband's death. The Court indicated that the jury readily understood the concept of "compensation," and that the instruction "did not imply that the verdict should be for the aggregate of the several benefits payable at different times, without making any allowance for the fact that the whole amount of the verdict would be presently paid at one time." 38 S.Ct. at 380. In *Western & Atlantic R.R. v. Hughes*, 278 U.S. 496 (1929), the Court reinforced the rule that when an FELA defendant is aggrieved by a trial court's general charge on damages, it is incumbent upon the defendant to request a more specific charge.

The court in *Pennsylvania Railroad Company v. McKinley*, 288 F.2d 262 (6th Cir. 1961), construed *Holloway* to mean precisely that "a jury, unaided by specific testimony as to money values, could themselves, being told that the award should be only money value," properly reduce the award to present value. *Id.* at 265. Importantly, the *McKinley* court also noted that jurors are presumed to be aware of the earning value of money when placed in safe investments. *Id.*

In *Duncan v. St. Louis - San Francisco Railway Company*, 480 F.2d 79 (8th Cir.), *cert. denied*, 414 U.S. 859 (1973), the defendant argued plaintiff should not be allowed future lost wages because there was no evidence on how to compute their present value. Despite defendant's failure to request an instruction to this effect the trial court instructed the jury as follows: "The award of damages for the loss of contributions from future earnings, if any, must be reduced to its present cash value and adequate allowance must be made for the earning power of money." *Id.* at 87. The Eighth Circuit held this was proper and adequate, even in the absence of present value evidence.

Likewise in *Heater v. Chesapeake & Ohio Railway Co.*, 497 F.2d 1243 (7th Cir.), *cert. denied*, 419 U.S. 1013 (1974), neither defendant nor plaintiff introduced evidence suggesting a method for computing present value. The court instructed the jury that it was not to simply multiply plaintiff's damages by the number of years he would live, but should determine the "present cash value" of such damages. The court explained the concept of present value in its instruction. *Id.* at 1249 n. 3. The Seventh Circuit, following *Duncan* and *McKinley*, held the instruction was sufficient, even in the absence of evidence on the point. The court also noted that it was the *defendant's* obligation to submit an instruction explaining computation of present value, if it wanted the jury to consider this. *Id.* at 1250.

Finally, in *Bonura v. Sea Land Service, Inc.*, 505 F.2d 665 (5th Cir. 1974), the court aligned itself with the *Heater*, *Duncan* and *McKinley* courts in declaring that actuarial and mathematical evidence was not an absolute prerequisite to the submission of an instruction on lost future wages when evidence of such a loss had been presented. *Id.* at 669.

Despite this uniformity among the circuits, Petitioner argues that two cases from the Third Circuit, *Ballantine v. Central Railroad of New Jersey*, 460 F.2d 540 (3d Cir.), *cert. denied*, 409 U.S. 879 (1972); and *DiSabatino v. National Railroad Passenger Corp.*, 724 F.2d 394 (3d Cir. 1984), require the Court to grant a writ of certiorari in this case. These cases are readily distinguishable from the case before the Court.

In *Ballantine*, the court stated that once plaintiff sought damages for future losses, the jury was "entitled" to receive evidence and guidance on methods of reducing lost earnings to present value. 460 F.2d at 544. Yet as to the defendant's entitlement in defending the claim of future loss, the court quoted with approval from *McWeeny v. New York, NH & H.R. Co.*, 282 F.2d 34, 40 (2d Cir.), *cert. denied*, 364 U.S. 870 (1960) (Lumbard, J., dissenting):

> "The defendant is entitled to a *charge* which will direct the jury's attention to every item and consideration which may substantially reduce the plaintiff's loss so that the jury does not charge the defendant with a loss which the plaintiff would never have to suffer. Even handed justice requires nothing less than this." (emphasis added)

The trial court in *Ballantine* had given only a general instruction on "present worth," which gave the jury no guidance on reducing the plaintiff's *future* lost wages to present value. The instruction was given over defendant's vehement objection, unlike in the case at bar, where the defendant *proposed* the instruction. All *Ballantine* holds is that the jury must be guided in some proper manner, and this guidance could be given by appropriate jury charge or instruction. In light of the detailed present value instruction now provided in *Devitt, Blackmar & Wolff*, Sec. 85.13, and the Court's admonition against trials becoming "graduate economic forecasting seminars," *Monessen*, 486 U.S. at 341, a proper present value instruction to the jury is all the Third Circuit would require. Here, Petitioner obviously cannot contest the instruction given by the trial court, since Petitioner drafted and tendered the instruction. Even handed justice requires that Petitioner — rather than Respondent — bear responsibility for any perceived deficiencies in the present value instruction.

In *DiSabatino*, the plaintiff convinced the trial court not to instruct the jury on present value at all. 724 F.2d at 395. Thus, it is impossible to predict what the court would have done had the jury been given guidance by the trial court on present value. *Cf. Brown v. Chicago & North Western Transp.*, 162 Ill. App. 3d 926, 516 N.E.2d 320, 330 (1987) ("*DiSabatino*, however, stands only for the indisputable proposition that the failure to give an instruction on reduction of future lost earnings to present worth was reversible error.").

Moreover, the railroad defendants in *Ballantine* and *DiSabatino*, as well as the defendant in *Reusch v. Seaboard System R.R.*, 566 So.2d 489 (Ala.), *cert. denied*, __ U.S. __, 111 S.Ct. 581 (1990) took the critical step of voicing their objections on future damages to the trial court. Petitioner completely failed to do this. Beyond question, had this case proceeded through a federal court in the Third Circuit, Petitioner would be held to have waived any complaint on present value. *See Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453, 457 n.1 (3d Cir. 1982), *rev'd*, 462 U.S. 523 (1983) (Appellant must demonstrate (a) specific acts or omissions by trial court constituting legal error, (b) properly suggested as error to the trial court along with suggestions of appropriate action, and (c) if uncorrected at that level then properly presented for review to the appellate court.)

Petitioner mistakenly suggests that the United States Court of Appeals for the Second Circuit has "joined" with the Third Circuit in requiring a plaintiff to introduce evidence of the present value of his future losses in order for the jury to consider the issue. In support of its contention, Petitioner cites *DeChico v. Metro-North Commuter Railroad*, 758 F.2d 856 (2d Cir. 1985). The only pertinent issue in *DeChico* was whether the trial court erred in refusing to instruct the jury on the effects of inflation when the court gave its present value instruction. According to the court of appeals, the trial court erred in holding that inflation only impacts future *lost wages* — which plaintiff did not seek — and not future pain and suffering. 758 F.2d at 860.

The *DeChico* trial court charged the jury on present value even though "*neither party* had offered any evidence relating to the proper discount rate or to an adjustment for inflation. . ." (emphasis added). Thus, *DeChico* clearly refutes Petitioner's argument that present value evidence is a prerequisite to an award of future damages. The court condoned the giving of a present value instruction as to future pain and suffering, *id.* at 860, condemned the failure to require the jury to consider

inflation, *id.*, and essentially considered unimportant the fact that no present value evidence was adduced. *Id.* at 859.

Petitioner's statement, petition at 8, that the state courts of Montana and Oregon require evidence of the present value of lost future wages before the jury can consider the issue, also is not true. A cursory reading of *Resner v. Northern Pacific Railway*, 161 Mont. 177, 505 P.2d 86 (1973), and *Plourd v. Southern Pacific Transportation Co.*, 513 P.2d 1140 (Ore. 1973), reveals that substantial evidence on inflation, discount rates and present value was adduced in each case. While the courts clearly held that such testimony was *admissible* — a point Respondent herein does not dispute — they do not declare that such evidence is *required.*

All the Court has required in this context is that if the defendant in an FELA case requests an instruction on present value, it must be given, *Dickerson*, 470 U.S. at 413, and that in requiring the jury to reduce the verdict to present value, the trial court must not *preempt* the jury's function. *Monessen*, 486 U.S. at 342. The Court stated in *Monessen*:

> We do not mean to suggest that the judge in an FELA action is foreclosed from assisting the jury in its present value calculations. Indeed, because "'[t]he average accident trial should not be converted into a graduate seminar on economic forecasting,'. . .the judge has an obligation to prevent the trial proceedings on the present value issue from becoming unnecessarily prolonged and the jury from becoming hopelessly mired in "difficult mathematical computation." It is therefore permissible for the judge to recommend to the jury one or more methods of calculating present value so long as the judge does not in effect preempt the jury's function. A trial judge's instructions to the jury with regard to discount methods — provided that they do not "subject the jury's estimate to . . . rigid mathematical

> limitatio[n]," . . . —are entitled to substantial deference on appellate review.

Id. at 341-42 (citations and footnotes omitted).

Finally, despite Petitioner's suggestion to the contrary, the Court's *Pfeifer* Opinion neither requires specific present value evidence nor places a burden of producing such on the plaintiff. The Court limited its attention to actions brought under Sec. 5(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Sec 905(b). *Pfeifer*, 462 U.S. at 547. The Court declined to establish an exclusive method for computing present value, and the reasons for this hesitation are clear.

Litigants must retain some freedom in deciding how complicated and prolonged they wish their injury trials to be. Counsel may wish to "forego the time and expense involved in proving inflationary trends and discount rates in trials involving lost future wages." *Kokesh v. American Steamship Co.*, 747 F.2d 1092, 1096 (6th Cir. 1984). While some parties may desire extensive present value testimony to bolster their future wage loss claim, others may prefer a properly worded, easily understood jury instruction. The courts that have addressed the issue have held that this is sufficient. Certainly, at trial Petitioner felt a present value instruction was sufficient. Nothing in this Court's precedent requires more, nor should such a requirement now be established for a submissible case of future damages. The application for writ of certiorari should be denied.

B. The Court May Not Exercise Its Writ of Certiorari Because Petitioner Failed To Present Its Argument To The Trial Court In The First Instance, Failed To Challenge Submissibility Of The Plaintiff's Case For Future Damages, And Presented Its Own Instruction On Present Value

Respondent submits that there is no reasonable basis for issuing a writ of certiorari in an FELA case for the purpose of

reviewing the status of present value evidence. However, even if the Court were inclined to review the issue, clearly this is not a proper case.

While federal law governs the substantive rights of the parties under FELA actions including the right to proper instructions on damages, the law of the forum controls procedural and evidentiary matters. *Kelly*, 241 U.S. 485; *Eickelman v. Illinois Cent. Gulf R. Co.*, 714 S.W.2d 611 (Mo. App. 1986). In the case below, Defendant did not move to exclude evidence of future damages, move for directed verdict on the specific issue of future damages, seek a withdrawal instruction on the issue, or proffer a specific, detailed jury instruction either excluding the claim of future losses or giving a present value formula. In fact, Petitioner at trial received all the relief on the issue that it requested, i.e., Petitioner submitted and the trial court gave a present value instruction. In Missouri, a party will not be heard to complain on appeal about an instruction it offered. *Bonnot v. City of Jefferson City*, 791 S.W. 2d 766, 771 (Mo. Ct. App. 1990).

As in the federal courts, litigants in Missouri must make known to the court the action they wish the court to take and provide reasons therefor. *Mo. Rev. Stat.* Sec. 510.210 (1986). A party suggesting it is entitled to a directed verdict must alert the trial court to the grounds for the motion in order for the issue to be preserved for appeal. *Hardy v. Barbour*, 304 S.W.2d 21, 38 (Mo. 1957). It is sufficient if the grounds of the motion are presented to the trial court "in the course of the trial." *Meyer v. St. Louis Public Service Co.*, 253 S.W.2d 525, 528 (Mo. Ct. App. 1952). Here, Petitioner made a motion for directed verdict pertaining solely to its liability. Petitioner never brought its concerns about lack of present value evidence to the trial court's attention.

How then can Petitioner complain to this Court that the trial court failed to take action it was never requested to take?

Petitioner was free to submit as detailed or as narrow an instruction as it deemed necessary to call the jury's attention to the fact that Respondent was receiving in one lump sum wages he otherwise would receive over a period of years. It is one thing for Petitioner to allege that evidence on present value was required to make a submissible case on future wage loss, and that the burden of producing such evidence was on Respondent as the plaintiff in the case. It is quite another thing to state that Petitioner, fully aware at trial that data on present value were not adduced, could then request the trial court to instruct the jury on present value and later claim no evidence supported the instruction.

Further, Petitioner's disingenuous, after-the-fact argument is crystallized in the first sentence of the present value instruction: "If you find in favor of plaintiff and *decide to make an award* for any loss of earnings in the future,. . ." Petitioner's App. A at A-16 (emphasis added). By tendering this instruction, Petitioner explicitly recognized that the jury could award future losses under the law and the evidence in the case. Nowhere in the record is there a proposed instruction which states: "Now you cannot award damages to the plaintiff in this case for any future lost earnings or loss of earning capacity," *Reusch*, 566 So.2d at 491, nor is there any suggestion by railroad counsel that the jury should not be charged "as to future wage loss and reducing to net worth because there has been no evidence to enable this jury to reduce future wage loss to present worth," *Ballantine*, 460 F.2d at 542, nor even a simple motion to preclude the jury's consideration of future lost earnings, *Gorniak v. National R.R. Passenger Corp.*, 889 F.2d 481, 485 (3d Cir. 1989). Also, this certainly is not a case in which the plaintiff convinced the trial court not to give a present value instruction. *DiSabatino*, 724 F.2d at 395. To the contrary, the trial court did exactly what Petitioner wanted it to do when it instructed the jury on present value.

Nothing in prior decisions of this Court even suggests that plaintiff *always* has the burden of adducing actuarial testimony

and annuity tables. The Court in *Holloway*, 246 U.S. 525, criticized the defendant for failing to tender a specific present value instruction, and instead taking a rigid stance on a state maximum interest rate. It seems clear from *Monessen* that neither party adduced evidence on present value. Clearly, the defendant had not, *see* 486 U.S. at 1853 (O'Connor, J., dissenting); *see also Morgan v. Monessen Southwestern Ry.*, 489 A.2d 254, 259 (Pa.Super. 1985), *rev'd*, 486 U.S. 330 (1988). Still, the Court held that the jury should have been instructed to reduce future damages to present value. 486 U.S. at 342. Several courts have held that the defendant, as the party with an interest in reducing the plaintiff's damages, has the burden of producing present value evidence if it wants a specific present value instruction. *See Alma v. Manufacturer's Hanover Trust*, 684 F.2d 622, 625-26 (9th Cir. 1982); *Aldridge v. Baltimore & Ohio R. Co.*, 789 F.2d 1061 (4th Cir. 1986); (*Aldridge I*) *aff'd*, 814 F.2d 157, 159 (4th Cir. 1987) (Phillips, J., concurring) (*Aldridge II*), *rev'd*, 866 F.2d 111 (4th Cir. 1989) (*Aldridge III*).

The effect of a record without present value data was considered by Judge Phillips in the en banc *Aldridge* opinion:

> [F]ailure to produce any specific evidence on the issue should have the normal effect of disentitling a party to any *specific* instructions on the issue. In some cases, this might require instructions specifically favorable to only one of the parties, where only one party produced evidence on the issue. In others, it might disentitle both parties to any specific instructions on the method of converting to present value. In the latter situation, however, both parties would still be entitled upon request, to a general instruction that in computing any amount due for lost earnings the award should be for present value. That is what *Dickerson* seems to me unmistakably to hold, but I think that is all it holds. The fact that the *Dickerson* court referred only to defendant's

> entitlement simply reflects the fact that it was the defendant in that case (as normally it would be) who objected to the failure to give any instruction on the issue.

814 F.2d at 159 (Phillips, J., concurring) (emphasis in original).

The Court recognized in *Monessen* that injury trials should not become "graduate seminars on economic forecasting." 486 U.S. at 341 (quoting *Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30, 39 (2d Cir. 1980), *cert. denied*, 451 U.S. 971 (1981). Petitioner downplays this scenario, and in its petition, at 12, directs the Court to a present value calculation that has no support in this record. Petitioner makes a further, non-record observation, *id.* at 11, that the current "real interest rate" is closer to 4%.

Petitioner's figures conveniently leave out the effects of inflation and wage increases, and purport to prove a "windfall" to Respondent. Petitioner's hypothetical, *id.* at 12, n. 1, reflects how easily injury cases become graduate economics seminars. Had the trial court used the "total offset method," which the Court did not disavow in *Monessen*, *see* 486 U.S. at 354 (O'Connor, J., dissenting), the verdict for Respondent may well have been the verdict that was rendered.[1] Had a 1% discount rate been utilized, the plaintiff's verdict would have been larger than if a 6% discount rate were used. Surely in any trial where the plaintiff's economist uses a 1% discount rate or the total offset method, the defense attorney will do one of two things. Either he will cross-examine the plaintiff's witness by asking him to

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[1] As the Missouri Supreme Court noted below, the jury in this case returned a general verdict, as required under Missouri procedure. Mo. R. Civ. P. 71.02. Thus, it cannot be stated that the jury "straight-lined" Respondent's lost wages since Respondent's losses were not purely economic. The jury may well have discounted Respondent's future wage loss and rendered a higher award for the pain and suffering Respondent endured during his numerous surgical procedures and concomitant disability.

discount future wage loss by a higher discount rate, and then argue the lower wage loss calculations to the jury in closing argument, or he will hire his own economist to testify. Thus, the battle over economics is waged, and the injury trial is unduly prolonged.

Petitioner's economics lesson comes too late. Had it wanted to use the figures now appearing in its petition for writ of certiorari, it should have brought them to the trial court's attention. Instead, Petitioner was content with a general present value instruction. This Court should not relieve Petitioner of its election, and none of the cases cited by Petitioner require the court to do so. No case has held that a defendant can successfully claim on appeal that the plaintiff did not make a submissible case for future wage loss after the defendant:

1) Failed to object to evidence on future wage loss;

2) Failed to move for directed verdict on the issue of future wage loss;

3) Failed to adduce present value evidence;

4) Invited the jury to consider future wage loss by proffering a present value instruction; and

5) Received everything it requested from the trial court.

Had Petitioner raised the issue of submissibility of a claim for future lost wages to the trial court, the case may have come to this Court with a dramatically different record. Faced with a motion to exclude future wage loss as part of his damages, Respondent may have sought to reopen the record for the sole purpose of adducing present value evidence, or stipulated to an appropriate discount rate. The trial court, in addressing such a specific motion for directed verdict, may have consulted the authorities Petitioner now cites in its petition for writ of certiorari. In this way, the court could have explained the reasons for its decision.

It also could have taken judicial notice of a particular present value table.

Further, the court could have decided to give a more detailed present value instruction than the one tendered by Petitioner. Depending upon the disposition of the motion, Respondent obviously would have tailored his closing argument to comport with the jury instructions. In Missouri, jury instructions are read before the argument of counsel. *State ex rel. State Highway Com'n v. Zahn*, 633 S.W.2d 185 (Mo.App. 1982). Because Petitioner failed to make a proper motion, and in fact submitted a present value instruction indicating the jury could award future damages, Respondent reasonably believed future wage loss and pain and suffering were fair topics of argument. It was incumbent upon Petitioner to raise its objection to future damages well before the verdict was returned by the jury. Its failure to do so precludes exercise of the Court's writ of certiorari.

CONCLUSION

The Court's writ of certiorari is not used to resolve hypothetical or contrived disputes. Petitioner points up three cases completely dissimilar to the case at bar, *Ballantine, DiSabatino* and *Reusch,* and suggests this case should be governed by the "rule" announced in those decisions. What Petitioner fails to state is that those three cases came to the appellate courts with complete records of action requested of the trial court, specific action taken by the trial court and, usually, an explanation by the trial court for its action.

No such record is present in this case. To the contrary, here the trial court was not requested to do anything other than what it did. Further, even if Petitioner had properly presented the issue to the trial court, there is no basis in FELA jurisprudence for the rule it now seeks. *Kelly* states that the proper measure of future damages is their present value. *Dickerson* holds only that when a defendant requests a present value instruction it must be given.

Monessen declares that in instructing the jury on present value the trial court must not preempt the jury's function of determining the plaintiff's damages. Nothing that occurred below runs counter to these decisions. The jury was instructed that the proper measure of Respondent's future losses was their present value, and the jury must be presumed to have carried out its duty.

Despite the Court's careful avoidance of rigid, inflexible present value requirements, as reflected by *Pfeifer,* Petitioner seeks a decree that in *all* FELA cases complex economic data must be introduced, and that in *all* such cases the plaintiff must present the data. The Court's FELA decisions, and those of the courts of appeal, suggest that such a decree is unwarranted and unwise.

The petition for a writ of certiorari must be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

LAWRENCE J. ANGLIM,
Respondent.

On Petition for a Writ of Certiorari to
The Supreme Court of Missouri

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondent's principal argument in opposition to the Petition is that petitioner supposedly did not timely raise the question presented in the trial court. Regardless of whether the claim was timely as a matter of state law,[1] the fact remains that the Supreme

[1] In order to preserve error as to the sufficiency of the evidence, Missouri courts require that the issue be raised either in a motion for directed verdict or in post-trial motions for judgment notwithstanding the verdict and new trial. *E.g.*, *Black v. Cowan Const. Co.*, 738 S.W.2d 617, 621 (Mo. App. 1987). The issue was raised in the trial court in petitioner's post-trial motions, which were denied. *See* Petition, p. 6.

Court of Missouri actually considered and decided the question of whether a plaintiff in an action under the Federal Employers Liability Act ("FELA"), 45 U.S.C. §51 *et seq.*, must offer any evidence of the present value of his lost future wages in order to meet his burden of making a submissible case on the issue. In ruling that a FELA plaintiff need not offer such proof, the Missouri Supreme Court held:

> Of more substance is defendant's argument that, since a present value instruction is required in FELA cases, evidence of the manner of computing present value is an essential element of an FELA plaintiff's burden of proof. Defendant relies upon two decisions of the United States Court of Appeals, 3rd Circuit, which so hold. *DiSabatino v. National Railroad Passenger Corp.*, 724 F.2d 394, 396 (3rd Cir. 1984); *Ballantine v. Central Railroad of New Jersey*, 460 F.2d 540, 544 (3rd Cir.) *cert. denied*, 409 U.S. 879 (1972). Defendant acknowledges the 8th Circuit has reached a contrary conclusion. *Duncan v. St. Louis San Francisco R.R. Co.*, 480 F.2d 79, 87 (8th Cir.), *cert. denied*, 414 U.S. 859 (1972).
>
> While no Missouri case has specifically addressed the point, Missouri appears to follow the rule laid down by the 8th Circuit [citing *Bair v. St. Louis San Francisco Ry. Co.*, 647 S.W.2d 507 (Mo. banc), *cert. denied* 464 U.S. 830 (1983)].
>
> * * *
>
> Therefore, we do not run afoul of the federal law by following *Bair* in holding that either plaintiff or defendant may offer present value evidence, but whether or not such evidence is offered, the subject is open to jury instruction if requested and to jury argument.... The sum included within the general verdict as compensation for future loss of wages is a matter forever relegated to the bosom of the jury.

> In the absence of any contrary indication, we can assume each juror in his or her respective fashion complied with the instruction and determined the present value of future wage loss.

App. A at A-17-18.

When a state court actually decides a question of federal law, the objection that it was not timely raised in the courts below is without force. *Orr v. Orr*, 440 U.S. 268, 274-275 (1979). This is merely an application of the "elementary rule that it is irrelevant to inquire . . . when a Federal question was raised in a court below when it appears that such question was actually considered and decided." *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134 (1914). As the Court has consistently held, "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley v. Ohio*, 360 U.S. 423, 436 (1959). *See also* C. Wright, *Law of Federal Courts*, §107, p. 745 (4th ed. 1983).

Respondent also questions whether a conflict exists between the decisions of the Third Circuit in *Ballantine* and *DiSabatino* and the decision of the Supreme Court of Missouri. Even putting aside the conclusion of the Missouri Supreme Court below that such a conflict indeed exists, *see* App. A. at A-17, respondent's efforts to distinguish the Third Circuit decisions are unavailing.

Respondent claims that *Ballantine* focused on an inadequate jury instruction which failed to give the jury guidance as to the reduction of the plaintiff's future lost wages to present value. Respondent has clearly misread the opinion and ignored its relevant parts. First, the jury instruction given by the *Ballantine* trial court was more detailed in its explanation of the concept of present value than the one given by the trial court in this case.[2]

[2] The jury instruction given by the trial court on present value is quoted at p. 4 of the Petition. The instruction given by the *Ballantine* court is quoted in 460 F.2d at 542 *n.* 5.

Second, the instruction given by the *Ballantine* trial court specifically stated that the process described is that "which is involved when you come to an award and award lost earnings in the future." 460 F.2d at 542 *n.* 5.

Respondent's suggestion that *Ballantine* turned on a jury instructional issue simply is not borne out by the opinion. The critical paragraph in the opinion is found at page 544 where the court stated:

> The record in this case . . . contains evidence of lost future earnings. The parties stipulated the retirement age from the railroad. Evidence was offered to show an annual diminution of earnings by $6,250.00. Plaintiff closed to the jury on this issue by multiplying the number of years of plaintiff's work expectancy with Central by the annual loss of earnings figure, arriving at a gross figure of $143,750. No other evidence was introduced on the method of reducing lost prospective earnings to present value. Under these circumstances, the award of damages cannot stand. *We hold that once evidence is presented and recovery is sought for future lost earnings, the jury is entitled to receive evidence and appropriate mathematical guidance on the method of reducing lost future earnings to present worth, if they are to act rationally and 'not upon mere conjecture and guess.'*

460 F.2d at 544 (emphasis added).

This description of the record in *Ballantine* is identical to that in the Missouri trial court below. Obviously, the Third Circuit and the Missouri Supreme Court differ over the significance of the plaintiff's failure to offer evidence of the measure of his damages for lost future wages.

DiSabatino stands for exactly the same proposition as *Ballantine*, *i.e.*, that plaintiff has the burden of offering evidence of the present value of his lost future wages. The only wrinkle

in *DiSabatino* that was not present in *Ballantine* was that at the time it was tried the Third Circuit's decision in *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453 (3rd Cir. 1982) was then before this Court on a petition for a writ of certiorari. After the jury verdict in *DiSabatino*, this Court reversed the *Pfeifer* decision. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983). The plaintiff chose not to offer evidence of the present value of his lost future wages and successfully opposed a jury instruction on the issue. The Third Circuit in *DiSabatino* reaffirmed the proposition that "the burden of producing evidence [of the present value of the plaintiff's lost future wages] rested with the plaintiff." *DiSabatino*, 724 F.2d at 395, *citing Ballantine, Russell v. City of Wildwood*, 428 F.2d 1176, 1180 (3rd Cir. 1970) and *Haddigan v. Harkins*, 441 F.2d 844, 853 (3d Cir. 1970).

Respondent confuses the question of whether an instruction on reducing the plaintiff's future lost wages to present value should be given (which is not raised in the petition) with the question of whether the plaintiff has the burden of proving the present value of his lost future wages (the issue raised in the petition). Plaintiff argues that in the absence of any evidence by either party, it is proper to submit the issue on a general instruction of the type refused by the trial court in *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409 (1985), relying on the concurring opinion of Judge Phillips in *Aldridge v. Baltimore & Ohio R. Co.*, 814 F.2d 157 (4th Cir. 1987). Whether Judge Phillips' concurring opinion or whether Judge Chapman's dissenting opinion in the same case was correct begs the very question petitioner asks this Court to resolve.

Respondent criticizes the sample present value calculation contained in the Petition on the grounds it has no support in the record. Petition, pp. 12 *n.* 1, 22 *n.* 4. Of course, neither party offered any evidence of how to calculate present value. The calculation of present value in footnotes 1 and 4 of the Petition were examples of mathematical computations of present value

based upon cases such as *Doca v. Marina Mercanti Nicaraguense, S.A.*, 634 F.2d 30 (2d Cir. 1980) *cert. denied* 451 U.S. 971 (1981) which suggested an historical "real interest rate" of 2%.

Respondent further criticizes the "real interest rate" used in the example in the Petition because it "conveniently leave[s] out the effects of inflation and wage increases." Brief in Opp. at p. 15. As noted in *Doca*, the "real interest rate" accounts for precisely these factors. 634 F.2d at 36-40. If counsel for the plaintiff in this action, who have many years of experience in representing railroad workers in FELA cases, do not understand the concept of real interest rates, than how can they argue that a jury of laymen would intuitively figure it out for themselves in absence of any evidence?

Respondent also cautions against requiring the admission of evidence of present value on the grounds that it might cause the trial to degenerate into a "graduate economics seminar." Brief in Opp. at p. 15. This fear is overstated. Every personal injury suit under the FELA already requires the plaintiff to produce medical evidence of the plaintiff's injury and its causation by the accident in question. Yet, no one has ever expressed a fear that personal injury trials may degenerate into "graduate medical seminars" even though doctors routinely are called to testify about injuries to various parts of the plaintiff's body.

The sample cross-examination proffered by the respondent, Brief in Opp. at pp. 15-16, is hardly indicative of a major trial management problem. Indeed, the jury may well follow the testimony of economists about discounting future wages to present value with the same degree of ease or difficulty as they follow a doctor's testimony about the details of CAT scans or magnetic resonance imaging tests of lumbar discs at the L5-S1 level, which are a routine feature of such trials. The courts have had no difficulty in dealing with present value evidence when it is offered. *See, e.g. Sampson v. Missouri Pacific R. Co.*, 560 S.W.2d 573, 587-589 (Mo. banc 1978).

Finally, respondent claims prejudice from a so-called "appeal by ambush" because it might have chosen to present additional evidence or try to reach certain stipulations had the argument been raised earlier. This is self-serving nonsense. The record establishes that respondent objected to the giving of the present value jury instruction because *petitioner* offered no such evidence. Tr. IV-459; Petition, p. 4. Under Missouri precedent as it then existed and as it stands now, an FELA plaintiff has no responsibility to present any evidence on the issue of the present value of his claimed lost future wages. The question of whether this is a correct legal position under the FELA is the issue raised by the Petition.

CONCLUSION

Petitioner claims that the plaintiff's burden of proof under the FELA is to offer evidence of his damages, including the present value of lost future wages. Respondent claims that he has no such burden and that the jurors may calculate such damages "in his or her respective fashion" with no evidentiary basis. The courts below, as detailed in the Petition, differ on the question. The issue is a recurrent one which should be resolved by this Court. Petitioner respectfully requests the Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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